

A HISTORY
OF
MEDIAEVAL POLITICAL THEORY
IN THE WEST

By

SIR R. W. CARLYLE, K.C.S.I., C.I.E.

AND

A. J. CARLYLE, M.A., D.LITT.

LECTURER IN POLITICS AND ECONOMICS (LATE FELLOW) OF UNIVERSITY
COLLEGE, AND OF LINCOLN COLLEGE, OXFORD

VOL. I.

THE SECOND CENTURY TO THE NINTH

By A. J. CARLYLE, M.A., D.LITT.

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VOL. I.

A HISTORY OF POLITICAL THEORY

FROM

THE ROMAN LAWYERS OF THE SECOND CENTURY TO THE POLITICAL WRITERS
OF THE NINTH

BY

A. J. CARLYLE.

PREFACE.

IN bringing out the first volume of a History of Mediaeval Political Theory, it may be well to indicate briefly the character of the work which we hope to carry out. In this volume we deal with the elements out of which the more developed theory of the Middle Ages arose; we hope to carry on the work to the political theorists of the sixteenth and early seventeenth centuries—that is, to the time when, as it is thought, the specific characteristics of modern political theory began to take shape.

The subject with which we are endeavouring to deal is strictly a history of theory, not of institutions. We believe, indeed, that in the Middle Ages, as at other times, the two things are closely related to each other,—that theory never moves very far away from the actual conditions of public life; but yet the two things are distinct, if not separate. The principles which lie behind the development of political institutions are sometimes the subject of careful reflection, sometimes are hardly apprehended; but in either case they are to be distinguished from any particular concrete forms in which they may be embodied. We have, indeed, been compelled frequently to examine the institutions of the Middle Ages, but we have done this only in order to draw out more clearly the character of the theories which were actually current among those who reflected on the nature of political life.

We are very conscious of the fact that in the attempt to deal with a subject which extends over so many centuries it is probable that we have made many mistakes, and have been guilty of many omissions. We can scarcely hope that we have succeeded in discovering or understanding every important reference to political theory, and we shall

be very grateful to any one who may enable us to supplement or correct our judgment upon any aspect of the subject

PREFACE TO VOLUME I.

WHILE I am alone responsible for the judgments which are expressed in this volume, it would have been impossible for me to prepare it without the work which my brother has already completed on the political literature of the eleventh, twelfth, and thirteenth centuries. I must express my indebtedness first of all to my friend the Rev. J. M. Schulhof, M.A., of Clare College, Cambridge, and Exeter College, Oxford, who has read through the whole of the proofs, and to whose learning and careful correction I owe the removal of many serious mistakes. But I must also express my most sincere gratitude to Mr A. J. Greenidge, Lecturer in Ancient History at Brasenose and Hertford Colleges, Oxford, who has read the proofs of Parts I. and II. of this volume; to the Rev. F. E. Brightman, Fellow of Magdalen College, Oxford, who has read most of Part III.; to Mr H. W. C. Davis, Fellow and Tutor of Balliol College, Oxford, who has read Part IV.; and to the Rev. J. N. Figgis, formerly Chaplain and Lecturer of St Catharine's College, Cambridge, who has read a large part of the work. These gentlemen are not responsible in any degree for the judgments expressed in this volume, but I am under great obligations to them for many important corrections and suggestions.

A. J. CARLYLE.

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PART I.

INTRODUCTION.

CHAPTER I.

THE POLITICAL THEORY OF CICERO.

BETWEEN the active and profound political thought of Plato and Aristotle and the energetic political speculation of modern times there lies a great interval of time and an almost equally great interval of character. It has often been thought that between these periods there was no such thing as a living and active political theory. It has been thought that with the disappearance of the free Greek communities political speculation became wholly abstract and lifeless; that the freedom of men's political thought was first crushed by the weight of the great empires, and then lost in the confusion of the barbaric invasions in which the ancient civilisation perished, and that in the sixteenth century political theory arose suddenly and without any immediate antecedents, being grounded in part upon original reflection, abstract or related to actual political conditions, and in part on the recovery of ancient philosophy.

Such judgments, we are aware, have long ceased to be held by those who have any acquaintance with the characteristics of mediaeval thought, and have been corrected by the work of several writers, especially in England by Mr R. L. Poole in his 'Illustrations of Mediaeval Thought'; but they still continue to affect the judgment of many, and even those who are

aware that in the Middle Ages political thought was both active and closely related to the actual conditions of society have yet no very clear conception of the relations of the

mediaeval theory to the ancient, or of the dependence of modern theory upon the mediaeval.

We think that the conception of the disappearance of a living political theory in the Middle Ages is fundamentally wrong, and that the more closely the political conceptions of the Middle Ages are examined, the more clear will it become that there is no such gulf between ancient and modern political thought as has been imagined. There are, no doubt, profound differences between the ancient mode of thought and the modern,—the civilisation of the ancient world is very different from that of the modern; but, just as it is now recognised that modern civilisation has grown out of the ancient, even so we think it will be found that modern political theory has arisen by a slow process of development out of the political theory of the ancient world,—that, at least from the lawyers of the second century to the theorists of the French Revolution, the history of political thought is continuous, changing in form, modified in content, but still the same in its fundamental conceptions.

We are indeed conscious of the fact that between Aristotle and the Roman Lawyers there are profound differences, and we would suggest that if there did exist anywhere a real break in the continuity of political thought, it would be found to lie here. We feel, indeed, that the inquiry on which we are setting out should have begun with the successors of Aristotle and Plato, and that there is thus an important omission in our discussion. But the subject of the later forms of Greek Philosophy is one which can only be adequately handled by those who are intimately acquainted with the greater philosophic literature of Greece, and we can scarcely pretend to this knowledge. We hope that some philosophic scholar will before long undertake this task; and we anticipate that under such a careful investigation much which is at present obscure in the transitions of thought will be explained, and that, while the fact of a great change in political theory during these centuries will remain clear, the process of thought by which these changes came about will be found capable of explanation.

The political theory of the Middle Ages is founded upon the theory represented by the Roman Lawyers from the second to the sixth century, and by the Christian Fathers from the second to the seventh century, while it is modified by the constitutional traditions and customs of the Teutonic races. We therefore have to begin our work with an examination of the political theory of the Roman Lawyers. We shall next consider the political theory of the Fathers, endeavouring to estimate the influence of distinctively Christian conceptions upon this. But before dealing with these subjects we must make some inquiry as to the antecedents of these political conceptions. A complete examination of these would involve that careful study of the character of the post-Aristotelian philosophy of which we have spoken. In the absence of this we must content ourselves with an examination of one or two Latin writers in whom we can, as it appears to us, trace the development of a good many of the characteristic conceptions of the Lawyers and the Fathers. Cicero has left to us in the fragments of the ‘*De Republica*’ and in his treatise ‘*De Legibus*’ a very interesting and significant account of the political theory fashionable in the first century before our era; while Seneca’s writings serve to illustrate some general tendencies of political thought one hundred years later. With the assistance of these writers we can in some measure reconstruct the general outlines of the political conceptions which influenced the Lawyers and the Fathers. We can at least learn from

them the commonplaces of political philosophy in their days, the notions current among the educated men of the period.

Cicero is a political writer of great interest, not because he possesses any great originality of mind, or any great power of political analysis, but rather because, in the eclectic fashion of an amateur philosopher, he sums up the commonplaces of the political theory of his time. We feel in reading him that, while he has no special contribution of his own to make to philosophy, he is really as interesting to us as if he had been able to do this. For, when we read him, we feel that we learn not so much what Cicero thought as what was generally current in his time; we learn how the honourable and right-minded and reasonably intelligent politician of his time tended to think, what were the conceptions which the public of that time would have applauded as being just and edifying with regard to the nature of society and the principles underlying social relations. We find these ideas expressed not in any very profound fashion, but with grace, with considerable clearness at least on the surface, and with an abundant and often impressive rhetorical eloquence.

Among the fragments of Cicero's 'Republic' which St Augustine has preserved for us in the 'De Civitate Dei' none is more important than a passage which comes, he says, from the end of the second book of the 'Republic.'¹ He tells us that in Cicero's Dialogue Philus requests that the subject of justice should be carefully discussed, especially because it was a common saying of the time that injustice was necessarily involved in the administration of the commonwealth. Scipio agrees to do this, and lays it down that no progress can be made with the discussion of the nature of the State until it is recognised, not only that the popular saying is false, but rather that the truth is that it is impossible for the State to have any existence at all unless it is founded upon and represents the highest justice. It is this conception which is expressed in the definition of the State propounded by Scipio:² "Res publica, res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis juris consensu et utilitatis communione sociatus." The commonwealth is the affair of the people, but the people is not any assemblage of men, gathered together in any fashion, but a gathering of the multitude united together under a common law and in the enjoyment of a common wellbeing.

Augustine in another passage comments on this definition, and asserts that Cicero defines the meaning of "juris consensu" when he says that the State cannot exist without justice:

where there is no justice there can be no *res publica*, and therefore no *populus*, but only a multitude which is not worthy of the name of *populus*.¹ On these grounds, he elsewhere says, Cicero maintained that when the government is unjust, whether a tyranny, an oligarchy, or a democracy, there is no *res publica* at all; an unjust government is not merely evil and injurious, but destroys the very being of the State?

Justice is, then, the foundation of law and of organised society, and Cicero is concerned to explain that he means by justice something which is wholly independent in its character of the consent of man. Cicero appears to have cited *Cameaeus* as maintaining that laws only arise out of the experience of utility, and that thus they continually vary in different places and times: that there is no such thing as justice in itself,

properly speaking, there is no such thing as justice, or else that justice is mere foolishness, and the only scarce of virtue is human agreement..¹ Cicero is as much shocked at these sentiments as any modern politician of respectable character

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would be, and denounces the theory of utility as the foundation of justice with much warmth and eloquence. It is not utility but nature which is the source of justice and law. Cicero is clearly maintaining the same view of justice as that of Chrysippus and the other Stoics as cited by Seneca⁵ and Plutarch in opposition to the theory of Epicurus and such thinkers as Carneades, who maintained that justice was the name for a convention devised among men for the advancement of their own utility.

Justice is a principle of nature, a principle which lies behind all the order of the world, the expression of a universal principle or law of nature—the ultimate principle behind all law. Lactantius has preserved for us a passage from the *De Republica* in which Cicero has with some real eloquence described this. There is a law which is the same as true reason accordant with nature, a law which is constant and eternal, which calls and commands to duty, which warns and terrifies men from the practice of deceit. This law is not one thing at Rome, another at Athens, but is eternal and immutable, the expression of the command and sovereignty of God.¹ In his treatise on laws, Cicero carefully points out that all civil law is but the expression or application of this eternal law of nature. That which is not derived from it may have the formal character of law but not its true character. The people or the prince may make laws, but they have not the true character of *jus* unless they are derived from the ultimate law. The original source and the foundation of *jus* must be studied in that supreme law which came into being ages before any State existed.²

It is important, we think, to observe with some care this emphatic exposition of the principle and character of the law of nature. Cicero's treatment may leave a good deal to be desired in point of clear analysis,—we may indeed doubt whether Cicero had himself a clear conception of the subject with which he is dealing. But we think that we have said enough to show both the importance of the theory of natural law in the current philosophical system with which Cicero was in sympathy, and also the close relation of this conception to the theory of justice. The theory of natural law is to Cicero the form of the theory of justice in society, and it is also the groundwork upon which the whole structure of human society rests. Human society is founded upon nature; its cause is "*naturalis quaedam hominum quasi congregatio*."⁸

We may feel that while Cicero's treatment of the law of nature represents a stronger emphasis upon the conception than that which is characteristic of older thinkers, he does not do much more than develop conceptions which belonged to them. It is very different with the subject which we must next consider, Cicero's theory of human nature and its relation to the institutions of society.

There is no conception which is more fundamental to the Aristotelian theory of society than the notion of the natural inequality of human nature. Upon this turns not only his theory of slavery but also his theory of Government. To Aristotle the institution of slavery is a necessary condition of civilised life and of a civilised social order, and it is natural, because there are some men so inferior to their fellows as to be naturally servile. And again, to Aristotle the government of civilised society is always the expression of the superiority of some men over others. The most ideal government is that of the best man

over his inferiors, next to that is the government of the aristocracy ; but even his ideal commonwealth is the rule of a small body of citizens, approximately equal in capacity and education, over a great unenfranchised multitude of inferiors, mechanical persons and slaves. It is a presupposition of his commonwealth that there should be a reasonable equality of virtue and capacity among all the citizens, or at least such a measure of it as, under a careful system of public education, will render every citizen moderately competent for the discharge of public duties. But this equality is confined to the small body of the citizens: the great majority of the persons included in the commonwealth are wholly inferior to the citizens and incompetent for the responsibilities of public duty. By nature some men are fit for rule, others only for subjection. There is a naturally servile class, possessing only a small share of reason, enough only to render obedience to the developed reason of others. True excellence or virtue is not within the reach of all, but belongs only to a few.

These presuppositions of the Aristotelian theory arose naturally from the circumstances of Greek civilisation, though they had been questioned by some writers before Aristotle. In general culture, and perhaps even more in political culture, the Greek belonged to a different world from the races which surrounded him. The distinction between the Greek and the barbarian might be exaggerated by the Greek, but the difference was real and profound. In art, in letters, in philosophy the Greek was not merely different from those who surrounded him, but belonged to another order. And in political matters

the subjects of the barbaric despotisms of the East might well seem to the Greek citizen to confess their naturally servile character, for they did not even possess or desire to possess the political responsibility of the Greek citizen. Centuries afterwards we find a citizen of the Roman Commonwealth laying it down that the Roman Emperor was the lord of free men, while the barbarian ruler was the master of slaves.¹ What Gregory the Great could say in the decline of the Roman Empire with truth of sentiment the citizen of the free Greek state felt as true in every fibre of his being.

There is no change in political theory so startling in its completeness as the change from the theory of Aristotle to the later philosophical view represented by Cicero and Seneca. Over against Aristotle's view of the natural inequality of human nature we find set out the theory of the natural equality of human nature. There is no resemblance in nature so great as that between man and man, there is no equality so complete. There is only one possible definition for all mankind, reason is common to all; men differ indeed in learning, but are equal in the capacity for learning. There is no race which under the guidance of nature cannot attain to virtue. The same virtues are pleasing, the same vices are detestable to all nations; all men can be made better by learning the true conception of life. It is only the perversions which depraved habit and foolish conceptions have brought, which cause men to differ so much from each other. Nature has given to all men reason, that is, true reason, and therefore the true law, which is right reason commanding and forbidding.² We shall see later how these sweeping generalisations recur in Seneca, and it can scarcely be doubted that we have here presented to us the foundation of those dogmatic statements of the lawyers like Ulpian and Florentinus,¹ in which all men are presented to us as being by nature free, by nature equal. We are indeed at the beginnings of a theory of human nature and society of which the " Liberty Equality, and Fraternity " of the French Revolution is only the

present-day expression. To complete the parallelism of the conception, we may observe that the “Fraternity” of the Revolution is only a later form of Cicero’s phrase,² “By nature we are disposed to love men ; this is the foundation of law.”

We have ventured to suggest that the dividing-line between the ancient and the modern political theory must be sought, if anywhere, in the period between Aristotle and Cicero. We think that this cannot be better exemplified than with regard to the theory of the equality of human nature. Further on we shall have occasion to examine the relation of Christianity to this conception, but in the meanwhile it must be noticed that the appearance of this conception is not consequent upon Christianity, however true it may be that the progressive translation of this great abstract conception into such measure of practical reality as it may now possess has been largely carried out under its influence.

Cicero already speaks with the cosmopolitan accent of modern civilisation; to him the older conception of an absolute natural difference between the civilised man and the barbarian has become impossible. It is not difficult to recognise the historical circumstances which probably were in the main instrumental in producing this change. With the rise of the Macedonian Empire, the intense but restricted culture of the Greeks became the culture of the world, losing much no doubt in intensity as it gained in expansion. The Greek went out into the world, and found that the barbarian whom he had thought to be incapable of rational cultivation was at least capable of reproducing his own culture. The conquest of the world by Hellenism had the necessary effect of changing the Hellenic conception of the world. The literature, the art, the philosophy of the Hellenic world might be on a lower plane than that of the Hellenic city, but it was Hellenic. If the Greek himself was thus compelled to admit that the barbarian was capable of entering into the commonwealth of Greek civilisation, if the Macedonian Empire convinced the philosophers of the homogeneity of the human race, this was necessarily and even more definitely the consequence of the Roman Empire. The Latin conqueror indeed was himself, to the Greek, one of the barbarians, and more or less the Latin recognised this,—more or less he was compelled to recognise that his intellectual and artistic culture came to him from the Greek. The Latin brought indeed, in his genius for law and administration, his own contribution to the cosmopolitan culture of the world, but that was all he brought. It was impossible for him to imagine himself to be the man possessed of reason and capable of virtue and to deny these qualities to others. The Roman Empire continued and carried on the work of the Macedonian Empire in welding the countries of the Mediterranean basin into one homogeneous whole. The homogeneity of the human race was in the Roman Empire no mere theory of the philosophers, but an actual fact of experience, a reality in political and social conditions. If the philosopher had learned to believe in the homogeneity of mankind under the Macedonian Empire, he was confirmed and strengthened in his belief by the experience of the Roman.

When we turn to Cicero’s theory of government we may find what we think are indications of the influence of this conception. In the meantime we may point out that while in Cicero’s writings the relation between the theory of equality and the theory of slavery is not drawn out, it is still worth noting that in one passage at least Cicero refers to the condition of the slave in a fashion different, at least in some respects, from earlier writers. We must, he says, act justly even to those of the lowest condition—that is, the

slaves—of whom it has been well said that they should be treated as hired labourers; they should be required to work, but should receive just treatment.¹ The suggestion that the slave should be regarded in the same light as a hired labourer comes from the Stoic Chrysippus, and suggests an important contrast with Aristotle's conception of the inferiority of the position of the mercenary labourer as compared with that of the slave. It is certainly worth noting that the slave is recognised to have his just rights; he is looked upon as a man with some independent personality. When we turn to Seneca we shall find that the relations of the theory of human equality to the independent personality of the slave is more fully drawn out.

There are indeed two fragments of the 'De Republica' which would seem to represent a somewhat different attitude to slavery from that which we have described. In the first of these, described by St Augustine, the question is raised as to the justice of the conquest of one nation by another, and, as St Augustine reports, it is maintained that such conquest is just because subjection (*servitus*) is useful for some men, as tending to check the tendency to licence. In the second passage, Cicero, as quoted by Nonius, seems to have been distinguishing between the unjust form of slavery, where those who are capable of being *sui* are *alterius*, and some just form, presumably when those are slaves who are incapable of governing themselves.²

There can be little doubt that in these passages we find Cicero to be speaking under the influence partly at least of the Aristotelian principle of the fundamental distinction in human nature; we find him thinking of mankind as capable of being divided into those who are able to govern themselves and those who are not. But we venture to think that such passages do not in any serious measure weaken the effect of those which we have already discussed. It must be remembered that Cicero's eclecticism is in part the expression of a certain incoherence in his philosophical conceptions, and that it is not a matter for any great surprise that we should find him holding together opinions hardly capable of reconciliation.

It must be observed that the first quoted passage may also be taken as indicating a tendency to one particular solution of some of the difficulties of social theory, which became in the course of time of the greatest importance. It will be observed that Cicero speaks of subjection as being a remedy for the tendencies to licence and evil, and this conception may be connected with Cicero's theory of the actual condition of human nature. In a passage which we have already quoted, Cicero points out that men would all be like each other, were it not for the perversion caused by depraved habit and foolish thoughts. Cicero at the same moment that he dogmatically maintains the fundamental similarity of human nature, admits that this is affected by the fact that human nature is constantly corrupted,—that this corruption brings into human life conditions and distinctions which are not truly natural. Cicero, that is, draws a distinction between the true or ideal character of man and the actual. Human nature is actually often corrupt and depraved, the fire of life, of truth, is extinguished, and the contrary vices grow and flourish under the influence of evil custom.¹ St Augustine represents Cicero as describing men as coming into being not only bare and fragile in body, but with a soul prone to terror, weak in will to labour, prone to lust, while yet a certain divine fire dwells in them.² Cicero's treatment of the subjection of man to man seems to anticipate the attitude of Seneca and the Fathers to

the institution of slavery and to the other institutions of civilised society. We can see the germs of a theory of human society which was ultimately to trace the great institutions of mankind to the necessity of checking the faults of human nature,—which would tend to look upon the organisation of the State as the necessary consequence of the depravity of human nature and as its true remedy. The inadequacy of this conception of the organisation of society is to our own mind sufficiently obvious, and indeed since the “Contrat Social” the tendency of political philosophy is obviously to return to the larger view of the great thinkers who look upon the organisation of society rather as the method of progress, both negative and positive, than as merely the barrier to vice and disorder. But for eighteen centuries political theorists were governed in large measure by this conception. Cicero, then, maintains the theory of natural human equality, but is partly conscious that this theory has to take account of the actual facts of human diversity and corruption.

We go on to consider his theory of the origin and character of the State. It would appear that Cicero was familiar with two theories: the one, that men were by nature solitary and had no inclination to the society of their fellows, but were driven by the dangers of life to seek each other out and to join together for mutual defence ; the other, which Cicero puts in the mouth of Scipio Africanus, who emphatically repudiates this conception, and maintains that men are naturally inclined to the society of each other.¹ We shall probably not be far wrong in supposing that the first view had been maintained by Carneades and probably by the Epicureans, while the view of Cicero himself is that of Aristotle and of the Stoics. We shall see that Seneca illustrates very clearly a great divergence between the attitude of the Stoics and the Epicureans towards the State.

Society to Cicero is a natural institution, and the organisation of society in the State is the greatest work to which a man can set his hand: human excellence never comes so near

to the divine as when it applies itself to the foundation or preservation of states.¹ Man is naturally made for society, and the great society of the State has grown up gradually on the foundation of the elementary form of human association, the family.² Cicero evidently follows the same tradition as Aristotle. We also find in him a conception of the development of the State which is worthy of notice, though its importance in political theory was scarcely perceived until the historical movement at the end of the eighteenth century, when Burke recognised its profound significance. We mean the conception of the constitution of a State as an organic growth in contradistinction to the conception of it as a mechanical product. At the beginning of the second book of the ‘Republic’³ Cicero says that he will rather discuss the actual constitution of the Roman Commonwealth than create one out of his own imagination, and mentions with approbation the opinion of Cato that the reason why the Roman constitution was superior to all others was that it had not been devised by one man’s wisdom or created by one man’s labours, but rather by the wisdom and efforts of many generations. It is interesting to observe this judgment, though it does not appear that it had any direct and immediate results in political thought.

Cicero, then, conceives of the State as being the natural method of human life. But he is careful to point out with all the emphasis that he can command that the State is not any chance association of men, whatever the methods and objects of the association. The State to be a State must be founded upon justice, upon law, and it must exist for the

promotion of the common wellbeing of all its citizens. This is the significance of that definition of the State which we have already quoted.⁴ The Commonwealth is the affair of all the people, but the people is not any assembly of men gathered together in any fashion, but is a gathering of the multitude associated together under a common law and in the enjoyment of a common wellbeing. The form of the government may vary, but the foundation of the State is

always this bond of justice and the common good. There must be government that the State may have continuance, but this government must always be founded upon, and express, the first principles of the association. Government may be in the hands either of one person or of a chosen few or of the whole people, and it will be legitimate if that first bond of association is preserved, the bond of justice and the common good, if the State is well and justly governed. But if the government is unjust, whether it is that of the king or of the few or of the people, then Cicero maintains that the State is not to be called corrupt, but rather that it is no State at all.¹ Who can call that a commonwealth (*res publica*) where all are oppressed by the authority of one, and where there is no bond of law, no true agreement and union?² So far Cicero would seem to follow the same general line of thought as Aristotle, the legitimacy of a form of government is determined by its end; so long as this is the wellbeing of all, the form of the government is comparatively immaterial. But we find also in Cicero traces of a conception not perhaps strictly new, but receiving a new emphasis. The three forms of government, he says, are only tolerable; he is not really satisfied with any of them. The least satisfactory form to him is that in which the whole power is in the hands of the people. The very equality of this is, in his judgment, unjust, since there are no grades of dignity. But he is equally dissatisfied with the mere aristocracy or monarchy; and it is here that his conception assumes a new significance. The most just aristocracy, such as that of the Massilians, or the most just monarchy, such as that of Cyrus, is to him unsatisfactory, for under such forms of government there is at least an appearance of slavery, and the multitude in such a State can scarcely possess liberty.³

Cicero's identification of liberty with a share in political power is another of the indications of the essentially modern character of his political thought. We seem to catch the commencement of that mode of thought which has been so characteristic of modern democracy, that political liberty is identical with the possession of the franchise, that even the best government is unsatisfactory which is not directly controlled by the people as a whole. We are not here discussing the value of this conception in political philosophy, but it is interesting to observe its appearance in Cicero. When we go on to consider the theories of the Roman Lawyers, we shall have to observe the fact that they knew of no other foundation of political authority than the consent of the whole people, and we shall have to consider the relation of this to the development of the theory of consent or contract as the foundation of the State. The conceptions of the Roman Lawyers and of Cicero are both related to the traditions of the Roman Government, to the constitutional theory which had grown up under the Republic; but we think that they are also related to that conception of the natural equality of men with which we have already dealt. Indeed it is obvious enough that Cicero's objection to monarchy and aristocracy rests upon this basis, that every citizen has in him some capacity for political authority, some capacity which ought to find a means of expression. Cicero is, in truth, dissatisfied with all the three simple forms of

government, both on account of their inherent character and because they all have a dangerous tendency to perversion: monarchy easily passes into tyranny, aristocracy into oligarchy, and democracy into the rule of the mob.¹ He is therefore himself in favour of a fourth form of government, compounded of the three simple elements, possessing some of the virtues of each, and possessing in greater degree the quality of stability.² His conception of this is, we have little doubt, in large measure drawn from the history of Rome, and it is not very materially different from that of earlier writers?

Cicero, then, look* upon the true order of the State as being founded upon the principle of justice, which is expressed in the law, and secures the common wellbeing. It should give to every citizen some share in the control of the public life, and

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developed. He has repudiated the traditional philosophical justification of slavery, but he has not considered the consequences of his own judgment. He has not drawn out in this connexion that distinction between the original condition of things and the conventions of human society which is, as we venture to think, the first meaning of the distinction made by Ulpian and the other lawyers of his school between the *jus naturale* and the *ius gentium*. On the other hand, his conception of organised society in relation to nature is well developed and clearly applied. He conceives of society as being natural to man, and of social organisation as needing to conform itself to certain principles of justice and certain characteristics of human nature, if it is to be legitimate. The State must be just and must also provide for liberty.

Cicero's conception of nature and natural law has then its ambiguities and perhaps its incoherencies, but it is evident that it is round this conception of nature that his philosophy of society revolves. "*Ex natura vivere summum bonum*," to live according to nature is the highest good, he says;¹ nature is the guide of man, the true test of justice and goodness. But nature is not found by man in solitude or in misanthropy, but in the society and the love of his fellow-man.

CHAPTER II.

THE POLITICAL THEORY OF SENECA.

WHEN we turn from Cicero to Seneca we find ourselves in an atmosphere of a somewhat new kind. The change from the Republic to the Empire necessarily brought with it certain changes in the idea of the State, but, what is perhaps more than this, we find in Seneca a professed philosopher of one definite school, who tries to adjust his views of life and of society to the general conceptions of that school. Seneca may not be a very profound philosopher; it is very possible to feel that he often mistakes rhetorical sentiment for profound ethical emotion, and that he has little of that power of critical analysis which might have given seriousness and force to his opinions: he is too much pleased with the fine sound of his own sentiments to examine them very carefully, and carry them out to their conclusions. But still, he does represent to us in a literary form, always interesting and sometimes forcible, the theory of life and society of the Stoic schools of his time, and he presents them with a certain coherence and consequence which differs not a little from Cicero's expression of the preferences of a well-mannered and honourable-minded philosophical amateur. And yet, after all, while there are important differences between Cicero and Seneca in political theory, we think that they

are governed by the same general conceptions, that they illustrate different forms of the same attitude to the theory of society.

It is somewhat curious to find that Seneca rarely if at all refers to natural law, that he nowhere discusses the conception of law as related to some general principle of life and the world. We think that this does not mean that he has a conception of things different in this respect from Cicero. For while he does not use the phrase "natural law," the phrase "nature" seems to occupy much the same place in his mind. To live according to his nature is the command of reason to man.¹ It is nature which teaches a man the true method of life.² Anger is foolish, for it is not natural.³ Nature is the test of goodness, everything which is good is according to nature, though there may be things in nature too trifling to deserve the name of good* Nature is that which is perpetual, unchanging: that which is variable cannot be truly natural.⁵

We may at least gather from these phrases that Seneca looks upon nature as being or containing a principle which is the test of truth and goodness, to which man must conform himself if he would find the true method and quality of life. In the main he seems to conceive of it as the permanent principle and end of life, not as identical with its primitive forms. We shall have to consider the question presently in relation to his conception of the primitive character of society, and we shall see then that while he may occasionally at least use the word "nature" as representing the primitive,⁶ yet his general tendency is to look upon the completest perfection of human nature in a developed society as being the true "nature" in man.

The conception of human nature in Seneca's writings is very similar to that which we have studied in Cicero. The conception of the equality of human nature is continued and developed in greater detail, but on the same lines as in Cicero's writings. The slave is of the same nature as his master, Seneca says, and he draws out this theory with real eloquence in the *De Beneficiis*. Some, he says, have denied that a slave can confer a benefit upon his master. Those who think thus are ignorant of the true principles of human nature. It is a man's intention, not his position, which gives the quality of a benefit to his action. Virtue can be attained by all, the free, the freedman, the slave, the king, the exile: virtue cares nothing for house or fortune, but only seeks the man. A slave can be just, brave, magnanimous.¹ Again, we all have the same beginnings, the same origin; no one is in truth nobler than another, except so far as his temper is more upright, his capacities better developed. We are all descended from one common parent, the world; to this we must all trace our origin, whether by splendid or by humble steps.² It is fortune that makes a man a slave.³ Slavery is hateful to all men; the kindness of a slave towards his master is therefore only the more admirable.⁴ And, finally, slavery is after all only external, only affects the body of a man: he errs greatly who thinks that the condition of slavery affects the whole man; his better part has nothing to do with it. The body may belong to a master, the mind is its own (*sui juris*): it cannot be given into slavery.⁶

These phrases may no doubt be said to be rhetorical, and it would be foolish to overpress their practical significance, but at the same time they seem to complete the impression which Cicero's writings have given to us, of the great change which had come over the philosophical conception of human nature. It may indeed be urged that Aristotle not only indicates that, even in his time, a conception of the unnatural character of

slavery was already current, but even that Aristotle himself is somewhat uneasy in his judgment as to the institution. Still, Aristotle's conception of the profound differences in human nature had, as we have said, its basis in what might well appear to the Greek mind the actual facts of life. Seneca's treatment of human nature shows us again how completely the Aristotelian view had gone; his view of human nature is in all essentials the view of modern times. Nothing indeed could be more significant than the stress Seneca lays upon the freedom of the soul. It is just where Aristotle found the ground and justification of slavery that Seneca finds the place of unconquerable freedom; the body may be enslaved, the soul is free.

It must not be thought that this speculation upon slavery is wholly abstract, and has no practical significance. When we consider the theories of the lawyers, we shall have occasion to compare the development of their theory with the actual legal modifications of the condition of the slave. It is worth while to compare Seneca's theory of slavery with his conception of the relations of master and slave in actual life. In one of his letters he deals with the question in detail. He represents himself as having heard with pleasure from his friend that he lived on intimate terms with his slaves: he finds that such conduct is eminently worthy of his good sense and learning. He bids him remember that if they are slaves, they are humble friends, nay, rather, they are fellowslaves. This man whom you call your slave is sprung from the same source, dwells under and rejoices in the same heaven, breathes the same air, lives the same life, dies the same death as you : you might be the slave, he the freeman. He is a slave, but perchance he is free in his soul. Who is not a slave ? one man is in bondage to his lusts, another to avarice, another to ambition, all men to their fears. Live with your slaves kindly and courteously, admit them to your conversation, to your counsels, to your meals; let your slave reverence you rather than fear you. Some may argue that your slaves will become your clients rather than slaves, that the masters will lose their dignity; surely it is enough that the master should receive the same honour as God, who is revered and loved.¹ We may find much of merely rhetorical sentiment in all this, but sentiment is only the reflection of the actual conditions and tendencies of life. It has often been observed that, as Roman society lost its primitive vigour and moral quality, it also grew more humane. Certainly the development of the humane sentiment is very clear. Seneca then looks upon human nature as fundamentally the same in all: we again find that we are close to the legal theory of the original and natural equality and liberty of men.

So far Seneca illustrates the same position as Cicero. But in his case these conceptions are related to others, which Cicero either passes over or rejects. Behind the conventional institutions of society there lay a condition in which these institutions had no place. Before the existing age there was an age when men lived under other conditions, in other circumstances, an age which was called the golden. In this primitive age men lived in happiness and in the enjoyment of each other's society. They were uncorrupt in nature, innocent, though not wise. They were lofty of soul, newly sprung from the gods, but they were not perfect or completely developed in mind and soul. They were innocent, but their innocence was rather the result of ignorance than of virtue; they had the material out of which virtue could grow rather than virtue itself, for this properly only belongs to the soul trained and taught and practised: men are born to virtue but not in possession of it. It is important to notice these points in Seneca's theory, for they serve to differentiate his

position from that of some later theorists of the state of nature. In this primitive state men lived together in peace and happiness, having all things in common; there was no private property. We may infer that there could have been no slavery, and there was no coercive government. Order there was and that of the best kind, for men followed nature without fail, and the best and wisest men were their rulers. They guided and directed men for their good, and were gladly obeyed, as they commanded wisely and justly. The heaviest punishment they could threaten was expulsion from their territories.¹

We have here a statement of that theory of the state of nature, which was to exercise a great influence upon the whole character of political thought for nearly eighteen centuries. It is true that the conception of the state of nature in Seneca is not the same as in some other writers; but the importance of the theory for our inquiry lies not so much in the particular

forms in which men held it, as in the fact that in all forms it assumed a distinction between primitive and conventional institutions which largely influenced the ideal and sometimes even the practical tendency of men's thoughts.

Seneca does not regard this primitive condition as one of perfection, rather as one of innocence—we may say that he regards it as representing the undeveloped, not the developed, “nature” of man—and he is thus in sharp contradiction to those who look upon this as the “natural” condition in the full sense of the word. But still it was a state of happiness, of at least negative virtue and goodness. Men passed out of it, not through the instinct of progress, but through the growth of vice. As time passed, the primitive innocence disappeared; men became avaricious, and, dissatisfied with the common enjoyment of the good things of the world, desired to hold them in their private possession. Avarice rent the first happy society asunder. It resulted that even those who were made wealthy became poor; for desiring to possess things for their own, they ceased to possess all things. The rulers grew dissatisfied with their paternal rule; the lust of authority seized upon them, and the kingship of the wise gave place to tyranny, so that men had to create laws which should control the rulers.

Seneca thus looked upon the institutions of society as being the results of vice, of the corruption of human nature: they are conventional institutions made necessary by the actual defects of human nature rather than the natural conditions of ideal progress. This point is so important in relation to later theory that it will be well to notice his conception of human nature somewhat more fully. In another of his letters he discusses the proper characteristics of human nature. Man, he says, is a rational animal; that is his peculiar quality, and reason bids man live according to this his true nature, a thing which ought to be most easy, but is made difficult by that universal madness which possesses mankind.¹

And in another letter we find him carrying out this idea in sentences which remind us forcibly of Christian theology. It was a true judgment, he says, of Epicurus, that the beginning of salvation (salutis) is the recognition of sin. If a man does not recognise his faults, he will not be corrected; it is idle to think of improvement while a man confuses his evil with good. Therefore let a man accuse himself, judge himself.¹

We have already seen in Cicero some traces of this theory of the corruption or faultiness of human nature; in Seneca it is more clearly and explicitly drawn out. And if we now put this together with his theory of primitive human life, we see that Seneca's view is, in all important points, the same as that of the Christian Fathers, that man was

once innocent and happy, but has grown corrupt. And, further, we find that what Cicero only suggests as the cause of the subjection of man to man, Seneca holds of the great institutions of society, property and coercive government, namely, that they are the consequences of and the remedies for vice. Private property is a necessary condition of a social order in which few men can rival Diogenes in his contempt for all wealth, and the best thing is that a man should have enough to keep him from poverty, but not so much as to remove him far from it.² And in the same way organised government and law is a necessary protection against tyranny. Seneca, that is, seems clearly to draw a sharp distinction between the conditions suitable to man, had he continued innocent, and those which are adapted to the actual facts of the perversion and corruption of human nature. The great institutions of organised society are conventions adapted to the latter conditions, good as remedies, but not properly to be called good in themselves. The coercive state is a great institution to which, as we shall presently see, men owe their service; but its actual form is not so much a consequence of man's true nature as a remedy for his corrupted nature.

So far Seneca's view is on the whole clear, perplexed only by the intrusion of the perpetual paradox of the promotion of good through evil; for it must be carefully borne in mind that Seneca's primitive man, though innocent and happy, had no true virtue, while man as we know him is oppressed by vice and misery, but is yet capable of virtue. But here we come to a point in Seneca's theory which requires careful notice, if we are not to misapprehend him, and in which also we find interesting matter for comparison with certain tendencies in the theory and practice of Christianity. Seneca uses phrases of great force and plainness to emphasise the conception of the self-sufficiency of the truly wise man. No one can either injure or benefit the wise man; there is nothing which the wise man would care to receive. Just as the divine order can neither be helped nor injured, so is it with the wise man: the wise man is, except for his mortality, like to God Himself.¹ It is only in some general, outward, and loose sense that it may be said that the wise man can receive a benefit.²

The conception of the self-sufficiency of the wise man had apparently developed in the later schools of philosophy, and at first sight it would seem as though this conception would necessarily greatly affect the conception of the relation of the individual to society. It seems clear that Epicurus and his school had applied it so as to destroy the notion of the necessary duty of the individual to society; but it is also quite clear that the Stoic writers had very clearly and emphatically repudiated the Epicurean view upon the latter point, and that, while generally maintaining the conception that the philosopher was independent of the help of society, they taught the imperative duty of serving society.

We should venture to suggest that this fact is closely connected with the character of the Stoic ethical ideas, at least as they are represented by Seneca. In one of his letters Seneca, discussing the nature of liberal studies, seems to deny any value to those which are not related to the moral life;³ his tone indeed is curiously like that of many religious writers on education. Seneca seems undoubtedly to look upon knowledge as advantageous only so far as it tends to make man better. He looks upon the philosophic life of meditation as the highest life; but he justifies the view by the argument that in the long-run it is the philosopher with his contemplation of nature and goodness who does most for the service of mankind. Nature, he says, meant that man should both act and contemplate, and

indeed men do both, for there is no contemplation without action.¹

The wise man, therefore, in Seneca's view may give his time to contemplation, but this does not mean that he is exempt from the obligation to the service of society. There is in Seneca's mind no real inconsistency between his view of the selfsufficiency of the wise man and his general theory of the relation of man to society. He has given ample expression to this theory in several treatises. Man is by nature drawn to love his fellow-man : man is born to mutual service or helpfulness.² The Stoic doctrine is that man is a social animal, born to serve the common good;³ and in his definition of the highest good in his treatise on the Blessed Life it is interesting to observe that the temper of mind which constitutes this includes the qualities of humanity and helpfulness. The highest good is a temper which despises the accidents of life, which rejoices in virtue, or, the unconquerable temper of a man experienced in life, tranquil in action, of a great humanity and care for those with whom he is concerned.⁴ Seneca is clear in maintaining that man is born to live in society and to serve it: his necessities may not drive him to this, but the true disposition of soul will do so.

The wise man, therefore, is driven to take his share in the work of society and, if it is possible, of the State. Part of a treatise which he devoted to this subject, the 'De Otio,' has come down to us, and furnishes us with a fairly complete picture of the current opinions on the subject. There was evidently a very clear difference between the Stoics and Epicureans upon the subject. Epicurus had said, "The wise man will not take part in the business of the commonwealth, unless some special cause should arise." Zeno, on the other hand, had said, "The wise man should take part in the business of the commonwealth, unless some special cause should prevent him." Seneca admits that there may be conditions of public life which make it impossible for the wise man to do any good in public affairs, and in such a case he will withdraw from them.¹ But even this does not mean that he will cease to serve the State. The philosopher and moral teacher serve the commonwealth as well as the politician; even under the thirty tyrants Socrates was able to be of use to the Republic.² The true rule of man's life is that he should be of use to his fellow-men, if possible to many; if this cannot be, then to a few at least of his neighbours. If even this is impossible, then let a man improve himself, for in doing this he is really working for the public good, for just as a man who depraves himself defrauds others of the good he might have done them, so a man who studies his own improvement really serves others, because he is rendering himself capable of being of use to them.⁸

Seneca then clearly maintains that the wise man is constantly bound to the service of society, and even if possible to that of the State. But he bids men remember, if it seems impossible to serve the State, that there are after all two commonwealths, the one that of the State in which we are born, the other the greater commonwealth of which the gods are members as well as men, a commonwealth whose bounds are only to be measured with the circuit of the sun; and he doubts whether the greater commonwealth may not be best served in retirement, in philosophic meditation upon virtue, upon God and the world.⁴ Such philosophic meditation is itself action ; nature calls us both to act and to contemplate, and this contemplation cannot be without action.⁶ Zeno and Chrysippus worked more for mankind than if they had led the armies of a nation or held its offices or made its laws: they made laws not for one state but for mankind.⁶ This conception of the universal commonwealth is interesting and suggestive, in its relation to the theory of

human nature, which we have already considered. We may perhaps feel that Seneca's mode of handling the subject suggests to our minds some doubt whether his hold upon the conception of the organic relation of human nature and progress to the organised society of the State is quite certain. Had the materials been more abundant, it would have been interesting to consider its relation to such a conception as that of Origen, who defends the Christians against Celsus, who blamed them for their reluctance to take office and bear arms: he urges that they are members of another society (*truorTy/za irarplZoi*), and that their service in the Church of God is directed towards the salvation of mankind.¹ There have, no doubt, been always traceable in the political theory of mediaeval and modern times two tendencies of thought, the one national, the other cosmopolitan, and though it is perfectly true that these ideas are not incompatible with each other, yet historically they have sometimes come into conflict.

Seneca, then, has a very clear general view as to the necessity of the State, of its fundamental importance in human life: he is even anxious to clear the philosophers of his time of the charge which seems to have been commonly made against them, that they were disloyal, or at least indifferent, to the State; he urges that no men are more grateful to the State than the philosophers, for it is under its protection that they are able to enjoy leisure for philosophic meditation.² He fully recognises that the State is necessary under the actual conditions of human nature, if only as a remedy for the corruption of human nature.

With regard to the conception of liberty and the best form of government Seneca seems to waver and hesitate. If Lactantius is correct in attributing to Seneca a fragment which he has preserved, he gives an account of the expulsion of the Tarquins, representing it as due to the hatred of slavery, and says that the Roman people determined to make the law rather than the king supreme. The Roman Commonwealth reached its maturity under this free government; but at last, when it had conquered the world, it turned its arms upon itself and finally returned as to a second childhood under the rule of one man. Rome lost its liberty, and its old age was so infirm that it could not stand without the support of a master.⁸ The same conception of the end of the Republic is presented in another place, where Seneca praises Cato, who, when his sword could not give his country liberty, turned it upon himself and so liberated himself;¹ and again, when he speaks of the same Cato as having struggled to maintain the tottering commonwealth, and when it fell, as falling with it—for Cato did not survive liberty, nor liberty Cato.² In these passages Seneca seems to think of liberty as being related to a certain form of government, and that this government is the only one suited to the character of a mature nation.

But in another treatise Seneca's tone is markedly different. He speaks indeed in praise and admiration of Brutus; but adds that in slaying Caesar he greatly erred, both as a philosopher and as a practical statesman. Brutus had forgotten the Stoic doctrine when he allowed himself to be terrified by the mere name of king, for the best form of State is the just monarchy. And he showed himself a man of little insight into the actual conditions of Roman Society, when he refused to recognise that the ancient character of the Roman people was gone, and that men were contending not as to whether they should be subjected to some one man, but only as to whom they should serve.³ Seneca gives us to understand that the technical Stoic doctrine of government, like the Aristotelian, treated

the form of government as being a matter of indifference so long as its end was just; and the contrast with Cicero's view is at least worth noting.

His acquiescence in the practical necessities of Roman life is also worth observing, and we may reasonably connect with this a very interesting treatment of the place of the Emperor in the State, which we find in the 'De Clementia.' Seneca is recommending clemency to the Emperor, and appeals to his sense of responsibility, to the magnanimity of soul which so great an office requires. The Prince should show himself such towards his subjects as he would wish the gods to be towards himself.⁴ He should remember that he out of all mankind has

been chosen to act in the place of the gods: the life and death, the fate and lot, of all men are in his hands.¹ He is the source of the laws which he has drawn out of darkness and obscurity, and he will keep himself as though he were to render an account to those laws.² The ruler, whether he is called prince or king, or by whatever other name he is known, is the very soul and life of the commonwealth. He is the bond which keeps the State together, and to his protection, therefore, all the people will devote themselves.³ Nothing can check his anger, not even those who suffer under his sentences will resist; how great then will be his magnanimity if he restrains himself and uses his power well and gently.⁴

These phrases are evidently rhetorical, and it would be unwise to insist too much upon them; but their recognition of absolutism, and their tendency to think of this as resting in some sense upon the divine providence, are at least worth noticing. When we come to discuss the theories of the Christian Fathers, we shall have to consider very carefully this theory of the divine source of government and the divine authority of the ruler. It would be going too far to say that Seneca has any clearly defined conception of this kind in his mind; but it is at least interesting to observe his tendency towards this, and it may very well be compared with a similar tendency in Pliny's Panegyricus.⁵

When we look back and try to sum up the general results of our examination of Seneca's political theory, we see that the most important difference between him and Cicero is to be found in his developed theory of the primitive state of innocence, the state before the conventional institutions of society existed, and the consequent theory that these institutions are only the results of, and the remedies for, the vices of human nature. In the course of our investigation we shall have to consider the history of this theory, to pursue it through many forms. We must again observe that, in Seneca's judgment, the fact that the innocent and unconventional state was

primitive does not at all mean that it was the complete expression of the true nature of man; on the contrary, while we must admit such an occasional ambiguity in his use of the phrase "nature" as we have pointed out, it is quite evident that Seneca conceived of the primitive state as being one in which man was yet undeveloped and imperfect, and that, while the actually existing conditions of society may be unnatural in so far as they arise from the vices and perversions of human nature, yet they are natural in so far as they are the methods by which man may, under the actual conditions of life, go forward and advance towards perfection.

PART II.

THE POLITICAL THEORY OF THE ROMAN LAWYERS.

CHAPTER III.

THE THEORY OF THE LAW OF NATURE.

WE have in the previous chapters attempted to examine the general character of political theory in the first century before Christ, and the first century after, in order that we may be better able to understand the historical position and significance of the conceptions of the Roman Lawyers of the Digest and the Institutes of Justinian, and the Christian Fathers from the first to the seventh century. It will not be doubted by any one who is acquainted with the political theory of the mediæval writers that their conceptions are based in large measure upon the Lawyers and the Fathers. They may often cite these in a very external and mechanical fashion, and, as we hope to show later, their political theory is as much affected by, and as closely related to, the actual conditions of their own times, as any other living system of political thought, yet the descent of their theories from those of the Lawyers and Fathers is unmistakable.

In this section of our work we propose to examine the general character of the political theory of the lawyers. We cannot usefully approach the Fathers until we have done this, for it is clear that the theory of the Fathers is primarily derived from that current in their time. We shall have to consider

how far these general conceptions of their time are modified under the influence of strictly Christian or Jewish conceptions, but we think it is certain that the general structure of their theory is in no way original. How much they may have derived directly from the lawyers it may be difficult to say, but we must study the lawyers in order that we may come to some conclusion as to the general character of the political theory of the Empire apart from Christian influence. The Digest and the Institutes of Gaius and Justinian are the best guides which we have for this inquiry, while it may be true that there are a good many points in which the Fathers may be thought to be nearer the general opinion of their time than the lawyers.

It has been sometimes supposed that the jurists are in the main disciples of one philosophical school—that they do more or less consistently adhere to the Stoic tradition. We venture to think that there is no sufficient evidence for such a judgment, that there is no sufficient reason for saying of the lawyers as a body that they belong quite distinctively to any one philosophical school. It is indeed possible that some of the lawyers came nearer to this position than others; the obvious divergence among the lawyers on the great question of the *jus natural*¹ may have some relation to disputes which are rather philosophical than legal. But in the main it would seem that it is best to regard the lawyers not as professed philosophers but rather as intelligent and able men, who when they turned from the sufficiently engrossing practical work of the interpretation and application of law to the changing conditions of Roman Society and speculated upon the foundations of Society and social life, took up the conceptions current among educated men without very carefully inquiring how far these were the doctrines of one school of philosophers rather than of another. Indeed one is more than half disposed to think that Ulpian, who, if any jurist, might be thought to show a speculative turn, intends to depreciate philosophy, when he somewhat pointedly contrasts the true philosophy of the lawyer as such, the study of justice, of the lawful and the unlawful, of the method of deterring men from evil and drawing them to good, with some feigned and presumably unprofitable system, which he does not further define.¹ At the same time, it is true that in some very important points the Jurists seem to follow a tradition which is the same as that of the Stoics, that their conception of

justice and of the nature of law is obviously related to that of the Stoics and opposed to such views as those of Epicurus and the later Academics.

The lawyers, then, are not, properly speaking, philosophers, or even political philosophers. There is little or no trace in their work of original reflection upon the nature of Society and its institutions; they seem to use the commonplaces of the political thought of their time just as any intelligent man might use those of the present day: natural law and natural equality do not perhaps mean much more to them than evolution or progress mean to the modern politician. But it must at the same time be recognised that the use which they made of certain conceptions not only serves to show us the general tendencies of political thought in their time, but did much to give those conceptions a clearness and precision which hitherto they had scarcely possessed.

We are fortunate in being able to examine the political theory of the Roman Lawyers at two distinct periods, widely separated from each other in time. In Justinian's Digest are preserved fragments of the work of the great lawyers of the second and the early years of the third century, and in the Institutes of Justinian we have a handbook of law drawn up by the lawyers of Justinian's Court in the sixth century. In the Code we have a collection of the most important Imperial constitutions belonging to the period from Hadrian to Justinian, which serve in some measure to illustrate the principles of law expounded in the Digest and Institutes. We are thus able to study the political theory of the lawyers, not as a thing fixed and unalterable, but as living and changing; we are able to some extent to discover which of the various legal theories of the second century did as a matter of fact dominate the general course of thought: for though it is true that the writers of the Institutes seem almost nervously anxious to combine the most divergent views of the great lawyers of the second and third centuries into one whole, yet they are unable to prevent us from concluding with some reasonable confidence as to the character of their own opinions. We are also able within the second and third centuries to trace in some measure the course of political theory and to study the conflict of opinion between various legal schools. The selections of which the Digest is made up are fortunately always cited with the names of the authors, and though Justinian¹ warns us that by his authority the compilers of the Digest were empowered to omit, and even alter, anything that seemed to them unwise or erroneous in the ancient writers, yet we have no reason to think that this power was very largely exercised. We are able in a few cases, especially in that of Gaius, whose Institutes have been preserved for us, to compare the original work of the great lawyers with the selections of the Digest; and though, as we shall have occasion to notice, some changes seem to have been made, yet our impression is that the compilers of the Digest did not avail themselves greatly of this authority to alter the selections which they made, at least on those matters with which we are here concerned.

The first subject which requires our attention when we approach the political theory of the lawyers is their theory of natural law, its relation to the law of nations and to the civil law. The subject is certainly perplexed and difficult, for we may doubt whether any of the lawyers had very clear conceptions upon the matter, and it has been rendered even more obscure by the attempt of the compilers of Justinian's Institutes to combine conceptions of the subject which are really incoherent, if not contradictory. There is no doubt that we find in the great lawyers of the second and third centuries not one view, but two. There can be no reasonable doubt that Gaius in the middle of the second century

recognised no opposition between the *jus naturale* and the *jus gentium*; while Ulpian at the end of the second century sharply distinguishes the one from the other. We shall endeavour to point out what we think to be the significance of this change of view and the reasons which convince us that the view of Ulpian is that which ultimately prevailed and so became the foundation of the mediaeval theory upon the subject.

We cannot approach the subject better than by examining the views of Gaius upon the *jus gentium*. In the first words of his *Institutes*, which are also embodied in the *Digest*, there are two propositions which are of the greatest importance: the first, that the *jus gentium* is universal, embodies principles which are recognised by all mankind; the second, that these principles have been taught men by *naturalis ratio*.¹ We must turn to other passages for additional details with regard to the *jus gentium*. In a section of the *Digest* taken from a work of Gaius which has not been preserved, and in which Gaius discussed the origin of property in various things, we have the important statement that the *jus gentium* is coeval with the human race,—embodies those principles which from the first beginnings of human life were taught to mankind by their natural reason.² In a third passage Gaius connects with the *jus gentium* another quality of great importance. Property by “tradition,” he says, belongs to the *jus gentium*, and is clearly consistent with natural equity.³

When we put together these various conceptions which Gaius connects with the *jus gentium*, we see that he conceives of it as that body of principles or laws which men have always learned from their reason to recognise as useful and just. The *jus gentium* is primitive, universal, rational, and equitable.

Gaius does not often use the phrase *jus naturals*, but from those passages in his writings where it occurs we conclude that it has much the same meaning to him as *ratio naturalis*. In his *Institutes* he speaks in one sentence of property as being alienated and transferred by “tradition” under the *us naturals*, and in the next, refers to this as agreeable to *naturalis ratio*.¹ There is no trace in any writing of Gaius which has survived to us of any opposition between the *jus gentium*, and the *jus naturals*; such an opposition would indeed seem to be wholly incompatible with the character of the *jus gentium*, as he conceives it.

It would seem, then, that the *jus gentium*, of Gaius is not greatly different from natural law as we have seen that Cicero understood it, except that, as we may perhaps say, Cicero is thinking of this as a part of the eternal law of God, while Gaius is only thinking of law in relation to the world. But they agree in thinking of law as a rational and just principle of life which is not enacted by men, but is the expression of the universal and natural reason and sense of justice. The theory of law which is held by Gaius, then, is not limited to the conception of the positive law of any one state, but is founded upon a conception of law, universal, primitive, and rational. We shall see later that the civil law of any particular state is at least in some measure dominated by this general principle of law.

We may infer that Gaius is, like Cicero, a follower of the Stoic theory of law and justice, regarding them not as something which men create for their own utility, but as something which they learn. Law in its general sense does not express the will of man, but is rather that which he rationally apprehends and obeys. The conception of the *jus gentium*, which we derive from an examination of these passages of Gaius is the same as

that expressed in the definition of the *jus naturals*, which Paulus, a lawyer of somewhat later date, gives us.² We have no reason to think that Paulus drew any distinction between the *jus naturals* and the *jus gentium*,—we have no evidence that he did so; and in any case this definition does not seem to take any such distinction into account, and indeed seems clearly, at least for the purpose in hand, to exclude it.

Gaius then recognises no distinction between the *jus naturals* and the *jus gentium*. In the beginning of the third century we find three lawyers who do clearly oppose the *jus gentium* to the *jus naturale* or *natura*. Tryphoninus says that liberty belongs to the *jus naturale*, and that lordship was introduced from the *jus gentium*.¹ Florentinus asserts that slavery is an institution of the *jus gentium*, by which one man is, contrary to nature, subjected to another.² Ulpian expresses the same opposition when he says that the manumission of slaves belongs to the *jus gentium*, for by the *jus naturale* all men were born free and slavery was unknown; but when slavery came in by the *jus gentium*, then manumission also came in.⁸ Ulpian has also drawn out the distinction between the *jus gentium* and the *jus naturale* in set terms. Private law, he says, is tripartite—it is gathered from natural precepts, or those of nations, or civil laws; there are three kinds of *jus*, the *jus naturale*, the *jus gentium*, and the *jus civile*. And he goes on to define their several characters. The *jus naturale* is that which nature has taught all animals; it is not peculiar to the human race, but belongs to all animals. From this law springs the union of male and female, the procreation and bringing up of children. The *jus gentium*, on the other hand, is that law which the nations of mankind observe: this is different from natural law, inasmuch as that belongs to all animals, while this is peculiar to men.⁴

In considering this subject we must be careful to keep clearly apart the two points suggested by these phrases of Ulpian: first, the definite separation of the *jus naturale* from the *jus gentium*, which is common to the three jurists; and secondly, Ulpian's definition of the *jus naturale*, which is peculiar to himself. The first is clear and distinct; whatever may be the character of the difference, the fact of the difference is something quite unambiguous. We cannot say the same with regard to his definition of the *jus naturale*.

As Ulpian presents this here, the *jus naturale* would seem to be something of the nature of the general instinct of animals, not properly speaking rational or ethical; while he does not actually contrast the rational character of the *jus gentium* with the irrational instinct of the *jus naturale*, at least he says that it is peculiar to men. To consider the definition fully, we must notice Ulpian's use of the phrases *Natural Law* and *Nature* in other places. The first passage where the phrase recurs is that to which we have already referred, in which he tells us that manumission is an institution of the *jus gentium*, for by natural law all men were born free.¹ Another passage which may very well be compared with this we find in the fiftieth book of the *Digest*. In this Ulpian says, that as far as concerns the civil law slaves are held *pro nullis*; but this is not so by natural law, for as far as natural law is concerned all men are equal.² In another place he says that a man seems “*naturaliter*” to possess that of which he has the usufruct;³ and again, that nothing is so natural as that an agreement should be dissolved by the same method as that by which it was made; * and in another passage still he says that it is by nature just that a man should enjoy another man's liberality only so long as the donor wishes.¹

We do not feel very clear as to the judgment which ought to be pronounced on the meaning of natural law and nature in these passages: they are not perhaps absolutely inconsistent with the character of the precise definition we have already quoted, but yet they leave with us the impression that they do not quite correspond with it. When Ulpian says that by natural law men were once free and are still equal, it scarcely seems adequate to explain this as meaning that as far as their animal instinct was concerned they were free and equal, but by a rational system of order they are unequal and some are slaves of others. We doubt whether Ulpian had really arrived at a complete and coherent conception of the law of nature: it would rather seem that he had for some reason judged that some distinction between the law of nature and the law of nations should be made, but that he was not very clear as to the nature of the distinction.

We do not get much help towards understanding this distinction from the other jurists. We have seen that Florentinus and Tryphoninus make the same distinction as Ulpian, but we do not possess any definition either of the *jus naturale* or the *jus gentium* written by them. We can only say that the character of the opposition between the *jus gentium* and the *jus naturale* or *natura*, as they present it, does not suggest that they understood *jus naturale* or *natura* to be equivalent to an animal instinct. Of the other jurists of the second century, as far as the fragments of their work enable us to judge, some appear to make no distinction between the *jus naturale* and the *jus gentium*, while others give us no indication of their view. Marcianus² and Paulus⁸ seem to know nothing of the distinction; Pomponius uses the phrase *jus naturae*, but does not define it.⁴

So far, then, as the lawyers of the second and third centuries are concerned, we cannot say that we can get a clear light upon the nature of the distinction between the Law of Nature

and the Law of Nations: the fact of the distinction is clear, the ground of the distinction remains somewhat uncertain. We think that we can find an explanation of this with the help of a passage cited in the Digest from the writings of a jurist of the fourth century, a passage in the Institutes of Justinian, and the definition of the *jus naturale* and the *jus gentium* given by St Isidore of Seville, a Christian writer of the beginning of the seventh century.

There is preserved in the Digest a passage from the writings of Hermogenianus, a jurist of the time of Constantine, which is undoubtedly interesting, though not free from ambiguities. We have here a list of institutions which come under the *jus gentium*? and we have the strong impression that Hermogenianus is contrasting these with other institutions which belong to the *jus naturale* or giving an account of the origin of institutions which had no existence under the *jus naturale*. This impression is difficult to resist when we compare with Hermogenianus the other passages to which we have just referred.

In the first of these the compilers of the Institutes, after giving an account of the *jus naturale*, the *jus gentium*, and the *jus civile*, come back to the subject of the *jus gentium* and explain that it is a system of law common to all mankind and represents the experience of the human race, for in process of time wars, captivities, and slavery arose, and these are contrary to the *jus naturale*? We cannot say that the writers of the Institutes had the passage of Hermogenianus immediately before them, but there is certainly a considerable correspondence of thought between their words and his.

St Isidore also defines the *jus naturale* and the *jus civile*, and

then comes to the *jus gentium*, and gives us a list of the institutions which belong to this, such as wars, captivities, slavery, treaties of peace, &c.¹ Again, we cannot say that St Isidore's definition is founded upon the passage from Hermogenianus, but at least it seems to us clearly to belong to the same tradition and to be closely related to the passage in the *Institutes*.

The impression which these passages leave upon us is this: that the writers have present to their minds some primitive circumstances, some primeval or natural institutions of the human race, as distinguished from even the oldest and most universal conventional institutions of human society. St Isidore indeed describes the *jus naturale* as that which is held "*in- stinctu naturae, non constitutione aliqua*."² We think that the position of Ulpian, Florentinus, and Tryphoninus may legitimately be interpreted with their assistance. We should suggest that the cause which produced the theory of a law behind the universal law of all nations was a judgment, that some at least of the institutions which were as a matter of fact universal, and were reckoned to belong to the *jus gentium*, could not be looked upon as, properly speaking, primitive or natural in the full sense of the word. We venture to think that here we trace the influence of that mode of thought about the primitive conditions of human life which we have seen in Seneca, and which we may gather was representative of the general character of at least some Stoic theories.

Ulpian clearly conceived of man as having originally been free, and maintained that slavery only came in later.³ That is, with respect at least to the institution of slavery he has in his mind some primitive state, before this conventional institution was introduced. Florentinus⁴ and Tryphoninus⁶ do not throw any clear light on the subject, but they seem to agree with Ulpian. There are no direct references, so far as we have been able to see, in the lawyers of the Digest to a primitive state of nature; but we think that this is really implied in the attitude of Ulpian, Florentinus, and Tryphoninus to slavery. We should suggest that it is in connexion with this that the distinction between the *jus naturale* and the *jus gentium*, arose. The passage from Hermogenianus which we have already cited seems to us to belong to a further development of the same theory. We shall see in a later chapter that there can be no doubt that the Christian Fathers generally accept the theory of the primitive state of nature in which the conventional institutions of society did not yet exist, while they give this theory a peculiar turn by bringing it into connexion with the theory of the fall.

We think therefore that the distinction made by Ulpian between the *jus naturale* and the *jus gentium* is really connected, though Ulpian may not have been fully conscious of the fact, with a tendency to conceive of some state of nature as lying behind the actual conditions of human life. Ulpian's definition of the *jus naturale* is not governed by this mode of thought; but we would suggest that this should be taken mainly as illustrating the fact that he had not arrived at any very clear conception of the whole subject. At least, whatever doubt we may continue to feel as to the true significance of Ulpian's distinction and definition, there can be little doubt that the tendency of legal theory was towards the distinction between the primitive and the conventional of which we have spoken. The *Institutes* of Justinian not only reproduce Ulpian's tripartite definition of *jus*, but in the passage we have already cited¹ they more or less definitely give us an account of the process through which the institutions of the *jus gentium* came into existence.

What the ultimate significance of this theory of natural law, as embodying the primitive principles of human life, was to be, we shall have occasion to consider later: we shall see in the Christian Fathers that the natural law represents a body of principles more or less ideal and adapted to a state of innocence, but not therefore related to the actually existing condition of imperfection.

CHAPTER IV.

SLAVERY AND PROPERTY.

IN considering the subject of natural law and the law of nations we have cited many of the passages which relate to the theory of slavery and equality. But the subject is one of such importance that even at the risk of some repetition we must examine some of these over again. We have seen that there is no point in which the Aristotelian mode of thought is more sharply contrasted with that of Cicero and Seneca than in the treatment of the equality of human nature. We have suggested that this change in the conception of the actual conditions of human nature can be accounted for in large measure by the new experience of the cosmopolitan Empires, by the fact that the Greeks in impressing their culture upon the countries of the Mediterranean seaboard discovered that after all the barbarian was possessed of reason and capable of virtue and of culture. However the change of conception may have taken place, there is no doubt that it did come about, there is no doubt that both Cicero and Seneca bear evidence to the fact that the older view was disappearing. It is of great importance to make ourselves clear upon the position of the Roman lawyers with regard to this matter: we may well imagine that the technical lawyers would be the last to yield to the new views, the most conservative of conceptions relating to so great and fundamental a social institution as that of slavery.

When we examine the writers of the 'Digest' in their chronological order, we discover that the appearance of the distinction, which we have been considering, between the natural law and the law of nations corresponds in point of time with the appearance of certain new phrases about human nature, with the dogmatic assertion of natural liberty and equality. It must not be supposed, however, that the older jurists of the Digest show us any trace of a belief that slavery is founded upon natural inequality. If they are silent on the theory of natural equality, they are equally silent, so far as we have found, on the opposite theory.

Gaius nowhere gives us any complete account of the origin of slavery. He assumes the distinction between the slave and the freeman as being one of primary importance in the classification of the law of persons,¹ and he gives us an account of the legal position of the slave and says that the slave is in potestate, and that this condition of slavery exists under the *jus gentium*, that everywhere the masters have the power of life and death over their slaves, and that whatever the slave acquires belongs to his master.² In another passage of the Digest he is cited as laying it down that slavery arises from capture in war.³ This is the only explanation of the origin of slavery which Gaius gave, so far at least as the evidence of his remains goes. Marcianus, a later jurist, is cited in the Digest as laying it down that slaves come into our possession by the *jus gentium* when they are captured in war or are born of our slave women.⁴ We may conjecture that his statement would represent the views of Gaius as well as of himself. These jurists then look upon slavery as an institution of the *jus gentium*, and taking into account what Gaius meant by the *jus gentium*, we infer that they looked upon the institution as rational and just; but they must not therefore be understood to hold the same views with regard to the

inequality of human nature as Aristotle. Indeed it is noticeable enough that they have no explanation to offer of the origin of the institution, except as connected with war.

When we come to Ulpian, Tryphoninus, and Florentinus at the close of the second century, we find that remarkable turn of theory whose expression we have already noticed in con

sidering the meaning of "natural law." It will be as well to put together these phrases in this new connexion. In the first place we may perhaps put the famous phrase of Ulpian: "*Quod ad jus naturale attinet, omnes homines aequales sunt.*"¹ It is just possible that this phrase is a little more technical than might at first sight appear, for Ulpian is evidently discussing the legal position of the slave, and the equality of which he speaks may conceivably have had primarily a technical signification, as equal in position before the law. Still, the phrase is very noteworthy in its bold and direct character. The impression it makes is not weakened but rather confirmed when we turn to his equally famous phrase, "*cum jure naturali omnes liberi nascerentur.*"² Slavery had no place under the *jus naturale*, but came in under the *jus gentium*. By the law of nature men were free and equal.

When we turn to Florentinus we feel that this conception of the natural freedom of man is again confirmed. Slavery is an institution of the *jus gentium* and contrary to nature. We even seem to trace a half-apologetic tone in the famous explanation of the name "*servus*" which Florentinus adds. The slave is called so because he is preserved alive and not slain as he might be by the laws of war.³ Tryphoninus, again, expresses the same judgment with great clearness, when he says that liberty belongs to natural law, lordship was introduced by the *jus gentium**

It may be urged that these are meaningless phrases, illustrating only the progress of an unpractical, sentimental speculation, which had no relation to the actual conditions of life. We think that this would be an exaggerated mode of speaking. These sentiments, just as those of Cicero and Seneca, were indeed held by men of whom we may fairly say that they never dreamed of overturning the actually existing conditions of society which were founded upon the institution of slavery, but that is not the same thing as to say that their phrases were meaningless and had no relation to the actual facts of life. We have seen that the sentiment of human equality was the result of the actual experience of the Mediterranean world,—that it only represents in theory an experience in fact. We venture to think that the theory of equality could not but react upon the theory of slavery, could not but alter the judgment of men as to its origin; and when we turn to examine the actual conditions of slavery as they are illustrated in the Roman Jurisprudence, we see that the change of theory was at least parallel with a change in the conditions of slavery.

If we turn back to that phrase of Gaius in which, as we have already seen, he describes the legal condition of the slave, we shall find it useful to notice that the words to which we have referred are followed by a sentence in which he tells us that the unrestricted power of the master over his slave, of which he has just spoken, did not any longer exist within the Roman Empire, and that all excessive cruelty on the part of the master was prohibited.¹ In the Digest, where these words are quoted, the compilers seem to have inserted "*legibus cognita*" after

"*sine causa*" and to have read "*puniri*" for "*teneri*,"¹ changes which are interesting as exhibiting the tendency to a growing strictness.

It is certainly worth noticing that the Roman Law had thus begun to limit the strict rights of the master and to interfere in the condition of the slave. In other references in the Digest we can trace this tendency back to the middle of the first century. Modestinus tells us that, by an edict of the Emperor Claudius, if a slave were deserted by his master on account of his suffering from severe illness, he was to receive his freedom ;² and that Vespasian decreed the liberation of slave women whose masters prostituted them, when they had been sold under the condition that they should not be prostituted.³ Ulpian says that Hadrian had banished for five years a certain lady, who on the very slightest grounds had outrageously ill-treated her slave women.⁴

Ulpian gives us at length a rescript of Antoninus Pius which, as he understands it, defines the law in the case of a master outrageously ill-treating his slaves or driving them to unchastity. The Emperor is anxious not to interfere with the rights of masters, but he judges that it is to their interest that those who are unjustly ill-treated should be protected, and he therefore, in a particular case referred to, orders that the slaves who had fled to the Emperor's statue—if it was found that they had been treated with greater severity than was just, or had been infamously injured—should be sold, and not restored to their masters.⁶

It is natural and reasonable to connect these tendencies of the Roman jurisprudence to regulate and ameliorate the condition of the slave with that great change in the conception of human nature of which we have spoken. It will be remembered that Cicero urges that the slave should be treated with justice, and that Seneca exhorts men to live with their slaves as friends and companions: the tendency of the Roman law to recognise certain elementary claims of humanity is naturally to be related to the recognition of the fact that the slave was essentially of the same nature and possessed of the same powers of reason and virtue as his master. We are well aware that the great changes in the position of the slave and the gradual disappearance of slavery in Europe must be traced in large measure to the operation of economic forces, just as is the case with the disappearance of villeinage in later times; but it is not therefore necessary to overlook the influence of the sentiment of human nature on social conditions. The economic and ethical foundations of society are not to be separated from each other, nor will historical truth be best served by insisting exclusively on one aspect of human life alone.

Whatever may be our judgment upon the matter, it is at least of importance to observe the fact that the lawyers, as well as those writers whom we have already examined, clearly indicate that the theory of natural inequality had disappeared, and that at least by the end of the second century the theory of a natural equality and natural liberty of human nature was firmly established. In later chapters we shall have to consider the relation of these theories to Christianity, but in the meantime we must make it clear to ourselves that Christianity did not produce these theories of human nature, but rather brought the same theories with it, whether derived from the same general sources or having antecedents of their own we shall have to consider. It may with much force be urged that in this matter Christianity turned what was to some extent an abstract theory into something which is continually tending to make itself real in outward fact; but when this is urged, those practical tendencies of the Roman Jurisprudence, of which we have spoken, must not be overlooked.

Our examination of the theory of slavery has then resulted

in our finding that at least with regard to this institution we may very well conjecture that the tendency of Ulpian, Tryphoninus, and Florentinus is to contrast the actual conditions of society with some primitive state in which such an institution did not exist. We have seen that in Seneca's theory this primitive condition is contrasted with the actual, with special reference to the absence of the institutions of property and coercive government. With regard to that particular form of property called slavery, we may feel that Ulpian, Tryphoninus, and Florentinus tend to the same opinion.

We must now consider the legal view of the origin of the institution of private property. We do not discuss the legal conception of property,—such a discussion would take us far away from our subject,—and we endeavour to confine ourselves to an inquiry into the view of the jurists as to the origin of property and its relation to natural law.

The earliest writers whom we have observed to be cited in the Digest on the subject are Labeo and Nerva Filius, two jurists of the first century. Paulus quotes both these writers, and we gather that Labeo and Nerva Filius treat of property as arising naturally from the occupation or capture of that which previously had belonged to no one.¹ We may compare a passage from Neratius, a jurist of the time of Trajan, from which we gather that some things are brought forth by nature which are not in the dominion of any one, and that these, as fishes and wild beasts, become the property of any one who captures them.² This is the foundation of the treatment of the origin of property by Gaius. In that passage to which we have already referred this is drawn out with much detail. It is by the law of nations that we acquire the possession of many things, such as wild animals and the property of our enemies; and it is by the same law of nations that we acquire things by "tradition": other things we acquire by the civil law.¹

If we turn now to Marcianus we find that he maintains the same view and tells us in set terms that some things are by natural law common to all, some are private property.² We have already seen that the *jus naturale* of this passage seems to be the same as the *jus gentium* of other passages from Marcianus,—that he does not distinguish between the two. Paulus also tells us that certain methods of acquiring private property belong to the law of nations and are natural.⁸ It would seem clear, then, that those writers who make no distinction between the *jus naturale* and the *jus gentium* looked upon the institution of private property as being primitive, rational, and equitable.

We turn now to those writers who make this distinction. It must be observed that we have very little information as to their conception of the origin of the institution of property. We have only noticed two passages from their writings which seem to bear on this. The first of these is contained in a definition of *Precarium* by Ulpian.⁴ This definition does not help us very much; it would be quite improper to conclude from it that he looked upon all forms of private property as belonging to the *jus gentium*. The other passage, which is from

Florentinus,¹ seems to show that his general theory of the origin of private property was much the same as that of the writers whom we have before examined. We should conjecture that Florentinus is describing one of the forms of appropriation of things which were before nullius. However this may be, one thing is clear, that Florentinus treats of one form of private property as belonging to the *jus naturals*. The institution of private property, then, to Florentinus is primitive and natural, and not like that of slavery, which is contrary to nature. So far then as our evidence goes, we can only say that Florentinus agrees with the other writers in looking upon property as a natural institution, even

though he differs from them on the relation of the *jus gentium* to nature; and that with respect to the position of Ulpian we have no information.

It only remains again to consider that passage from Hermogenianus² which we have already had occasion to examine in connexion with the question of the contrast between the institutions of the *jus gentium*, and those of the *jus naturale*. Again we have to lament our ignorance of the general position of Hermogenianus. We cannot but retain the impression that he is contrasting these institutions with others which belong to the *jus naturale* or to the *jus civile*. We have at least to notice the description of the *dominia distincta* as belonging to the *jus gentium*, and we have the impression that he looks upon this form of property as belonging to a condition of things not perhaps entirely primitive. Our interpretation of Hermogenianus is naturally affected, as we have already said, by a comparison with the Institutes of Justinian³ and the Etymologies of St Isidore;⁴ but we have already cited these and we need not again go over the ground.

Our examination of the Roman Lawyers with regard to the origin and character of private property has yielded us the following results. Those lawyers who, like Gaius, make no distinction between the *jus naturale* and the *jus gentium* clearly look upon the institution of private property as rational, just, and primitive. They know nothing of any condition of human life where private property did not exist. It is likewise clear that Florentinus, although he distinguishes between nature and the *jus gentium*, also holds that private property is natural, belonging to the *jus naturale*, and therefore primitive as well as rational. The position of Ulpian and Hermogenianus is uncertain. We have no means of arriving at any confident conclusion with regard to their views, although we may incline to think that Hermogenianus very possibly reckoned private property as belonging to the *jus gentium* and not to the *jus naturale*.

The Lawyers, then, do not, so far as the theory of property is concerned, give us much help in studying the development of the theory of a state or condition of nature. We have seen that with regard to the institution of slavery Ulpian, Tryphoninus, and Florentinus certainly seem to incline to contrast the primitive with the actual, but there is no evidence of any tendency to develop this with reference to other institutions. We have seen that this theory was current among the Stoic thinkers; we shall find it again in the Fathers, and we shall see that Ulpian's distinction of the *jus naturale* from the *jus gentium* is one of the conceptions which ultimately gave it clearness and precision. But, except with reference to slavery, it does not appear that even the school (if we may call it so) of Ulpian developed the theory of the state of nature with any clearness, or indeed that the conception is very distinctly present to their minds at all, for even their treatment of slavery tends rather to fall in with such a theory than to be definitely and consciously, by them, related to it

CHAPTER V.

THE THEORY OF THE CIVIL LAW.

WE have seen with what emphasis Cicero maintains that all law is derived from the one eternal law of God, which is the same as the principle of justice and reason in man's heart; we have seen how indignantly and scornfully he repudiates the notion that unjust laws are true laws (*jura*), how emphatically he maintains that neither kings nor people can make that to be law which is not the expression of the eternal principles of justice. We have now to consider what is the principle and definition of the civil law in the great

jurists. We must adopt the chronological method in examining our subject, for though, as we think, there is little trace of variation among the lawyers on this subject, yet we cannot but recognise the fact that there are some ambiguities in their statements, and at any rate we cannot arrive at the same certainty with regard to some of them as with regard to others.

We commence our inquiry with Gaius, and, indeed, a sentence of his *Institutes* indicates the legal conception of the relation between the positive law of the State and the principles of reason, as clearly as any passage we can find. He is speaking of the guardianship or tutelage of those who are under age, and says it ought to be a principle of the law of every State that those under age should be under guardianship, for this is agreeable to natural reason.¹ Natural reason is the guide and director of all civil legislation ; this natural reason is itself the source of the *jus gentium*, and therefore controls both the general law of mankind and the particular law of any one State. The conception of law as necessarily conformed to some general principle apart from the caprice of any individual or group of individuals is sufficiently indicated in this phrase.

The matter is, however, much more completely developed by Marcianus early in the third century. He cites two most important Greek definitions of law, whose significance for our purpose is very great. He first cites a definition of law put forward by Demosthenes and then one of Chrysippus, whom he describes as “*philosophus summae stoicae sapientiae*.” Marcianus makes no comment on these two definitions, and we may take it that he accepted them as representing his own conception of the subject. It is evident enough that the standpoint of the two writers is not by any means the same; but, at the same time, there is a very substantial agreement between them on some of the most important points of the conception of law. In the first place, they both of them regard law in the general sense as being something which is related to the divine or universal order as well as to the regulation of any particular State. Every law, Demosthenes says, is discovered and given by God; while Chrysippus treats law as the ruler of all things both divine and human. Law, according to Demosthenes, is intended for the correction of offences; while Chrysippus says that it is the norm or standard of things just and unjust. Both Demosthenes and Chrysippus bring their definitions into relation with civil law, by defining law, in the sense in which they are using the term, as being that which all in the State must obey and as belonging to all living creatures which are by nature political. To these more general conceptions Demosthenes adds certain specific conditions of the civil law—namely, that it should be set forth by the wise man, and should be agreed to by the whole State: to these we shall have to return when we consider the nature and source of authority in the State.¹

These definitions of Demosthenes and Chrysippus bring out very clearly what we have already seen is indicated by Gaius, that civil law is to be regarded, not primarily as expressing the will of any community or person in a community, but as the particular application in any community of the principles of the universal reason and justice. This is indeed substantially the same view as that of Cicero. We do not suggest that Marcianus is to be considered as a strict disciple of the Stoic school; but clearly enough he, like Cicero, follows the Stoic conception of justice and law, as contrasted with that of the Epicureans or the later Academics.

So far we have examined the opinions of those to whom the distinction between the/us naturals and the jus gentium had no special meaning, and we have seen that this does not in the least affect their view of the relation between the civil law and the general or universal principles of justice. We turn to the view of Ulpian, as representing the new theory, and we find him maintaining the same view with greater detail, but on the same general lines.

The compilers of the Digest open that work with a very significant and important statement by Ulpian on this subject.¹ Nothing could well be clearer than the general tendency of these sentences. The jurist must understand that law is the art of the good and just, that it is his duty to study the meaning of this, to distinguish the just from the unjust, to draw men to do what is good. The law, that is, which the jurist has to deal with, is not to be looked at simply as a series of positive regulations of any particular society, but rather as the expression of the perpetual principles of justice and goodness.

These views are further illustrated in the well-known phrases in which Ulpian attempts to define the nature of justice, the main principles of law (jus), and the true character of jurisprudence.¹ These famous phrases, repeated constantly throughout the Middle Ages and later, may suggest to us that Ulpian was rather a facile and rhetorical than a profound thinker upon law: we may feel that these sentences, for all their admirable sound, carry us little further, and that we do not know much more about the nature of justice than we did. But regarded historically, these words are of the greatest importance, not merely as assuring us of Ulpian's position, but as forming one of the most important links in the chain by which the theory of law of the ancient world was handed down to mediaeval and so to modern thinkers. The general view of Ulpian, then, is obviously the same as that of Marcianus and that which is indicated in the sentence of Gaius which we have already quoted.

We have, however, another statement of Ulpian's in which the relation between the civil law and the natural law is more specifically, but also more ambiguously, dealt with.² We cannot but regret that the compilers of the Digest have not preserved for us a more detailed explanation of these somewhat ambiguous phrases. They are obviously capable of a meaning in harmony with the conclusions which we have drawn from the statements we have already examined, but they might also bear a somewhat different construction. It is easy enough to understand what Ulpian means when he speaks of the civil law as being something added to the jus commune, a phrase which seems to mean simply the jus naturale and "us gentium, as being universal in their application, but it is not so easy to understand what he means by the jus civile as something which may take away from the jus commune.

The first phrase which suggests itself as possibly furnishing us with the means of comment on Ulpian's words is that phrase of Florentinus which we have so frequently cited,¹ slavery is an institution of the jus gentium and contrary to nature. It is true that Florentinus is here speaking of the relation of the jus gentium to nature, but it would seem that the words might be applied to the relation of the jus civile to nature. Ulpian has expressed the same opposition, with reference to the same institution. By the jus naturale, he says, men were born free; by the jus gentium they are enslaved;² and in another place, as we have seen, he has contrasted the relation of the jus civile with that of the jus naturale on the subject of the equality of men.³

We seem to find in these phrases of Florentinus and Ulpian illustrations of what Ulpian may mean by the civil law as taking away something from the *jus naturale* ; but we are still far from clear as to how this is to be explained in conformity with the general conception of law which he seems to maintain. The word *jus* is, he has told us, taken from *justitia*; *jus* is the “*ars boni et aequi*”; of the lawyers he has said, “*justitiam namque colimus et boni et sequi notitiam profiteamur.*” Justice, then, must reside either in the *jus naturale* or the *jus gentium* or the *jus civile*, or in all of them. It is possible to maintain that Ulpian does not connect it specially with the *jus naturale*. We have seen that his definition of that system of law leaves us very uncertain whether he had any clearness of conception about it; but it is very difficult to suppose that in that case he did not find justice in the *jus gentium*, where, as we have seen, it would appear that the lawyers who take the same view as Gaius, found it.

We should suggest that the explanation may again be found in the relation of the conceptions of Ulpian and Florentinus to the theory of a natural state antecedent to the conventions of organised society; and that, just as Seneca looks upon the institutions of property and organised government as the result of the progress of vice among men, and yet regards them as adapted to, and therefore justifiable under, the actual conditions of human life, so Ulpian and Florentinus may conceive of the *jus civile* as differing from the *jus naturale*, as the conditions of the conventional life differ from those of the natural, and yet as being just under the actual conditions of human life. We shall see that this is the explanation which the Christian Fathers furnish of the contrast between the primitive or natural conditions of human life and the actual; and the fact that in this matter Seneca seems to represent a current Stoic tradition encourages us to think that the lawyers, like Ulpian and Florentinus, may have been influenced by some such ideas, even though they were not very clearly conscious of their influence.

There remains to be considered a sentence of Paulus, a contemporary of Ulpian. We have already mentioned this phrase, and must now reconsider the passage with relation to the subject we have in hand. Paulus says that we may define law in different fashions: in one way when we speak of that which is always just and good, this is *jus naturale*; in another way when we speak of that which is useful to all or the majority in any State, this is *jus civile*.¹ At first sight we seem here to have a frank recognition of the utilitarian and interested character of civil law, and might feel inclined to think that Paulus must represent that tradition which so much angered Cicero, that law is merely that which is convenient to those who have power in any State. It is of course possible, though not probable, that this may be the case. We do not know that there is any reason to maintain that such opinions were not current at the time when Paulus wrote, and that he might not have been influenced by them. At the same time, in the absence of any other clear trace of such a view in the Digest and Institutes, we feel rather disposed to think that Paulus used these words without any great care, and that we therefore must not press their significance to those conclusions which might be drawn from them. We think that he very probably intended nothing more than a contrast between the perpetual principles of justice embodied in, or represented by, what he calls the *jus naturale*, and the temporary and changing application of those principles as adapted to the varying circumstances and varying desires of the members of any State.

We have seen then, that, except so far as there may be some doubt about the position of Paulus, the Roman Jurists of the second century hold a clear view of the relation of the civil law to the principles of justice; whether these are looked upon as embodied in the *jus naturale* or the *jus gentium*. They hold with Cicero that the civil law is organically related to the ultimate law of reason and justice; that it is not merely the expression of the capricious will of the lawgiver, but constantly tends, at least, to embody, to apply to the actual conditions of life, principles which are of perpetual obligation. We have seen that it is possible that the judgment of some of these may have been perplexed by their own distinction between the *jus naturale* and the *jus gentium*, that they may have felt that actually existing or universal institutions could not be considered to belong to the primitive and perpetual principles of life, while they were not prepared to condemn them. This only illustrates a perplexity of mind, which was indeed a natural result of the perpetual ambiguity in the conception of social justice in relation to the ideal justice, whether this is regarded as belonging to the past or to the future. The regulations of society ought to be just, and yet we are constantly compelled to amend them. Their claim to the obedience of man is founded upon the fact that they represent justice, and yet they never are in the complete sense of the word just. The perplexity with regard to the past found a solution for many centuries in the theory of a change in the condition of human nature, in the judgment that principles of perfect justice which were adapted to a condition of perfect innocence cannot well be adapted to a condition of vice and imperfection. In the eighteenth century, when many thinkers understood very imperfectly the social significance of the faultiness of human nature, the difficulty resulted in the revolutionary bias given to the conception of the return to nature. Gradually men have turned back to the conception of perfect justice as belonging to the future, as being the ideal towards which the institutions of society tend, the principle which governs their development; but the difficulties of the actual condition have not therefore been completely solved. It is a thing worthy of note how few have recognised the significance of the most resolute modern attempt to suggest a solution, the attempt made by Rousseau in his theory of the "General Will." In England Professor T. H. Green and, recently, Mr Bosanquet are among the very few who have recognised the real importance of that theory.

CHAPTER VI.

THE SOURCE OF POLITICAL AUTHORITY.

WE have still to consider the theory of the Roman Lawyers with regard to one very important subject, the source of authority in the State. It will be remembered that we found in Cicero a very interesting tendency towards a conception of liberty, as identified with a share in the control of the State. The Roman Lawyers of the second century and onwards deal briefly indeed, but very distinctly, with the question of the ultimate source of authority in the State, and we think that, so far, they do very clearly carry on the tradition represented by Cicero. They do not conceive of the Roman citizen as having any direct share in the actual administration of the Commonwealth, but in their view the Roman citizens are the sole ultimate source of authority, whether legislative or administrative. The relation of their view to that of Cicero is interesting, but much more important is the connexion between their theory and the democratic theory of mediaeval and modern times. The mediaeval theory of the social contract, which, so far as we know, was first put forward definitely in the end of the eleventh century, may have relations

with such ancient forms of the theory as are perhaps suggested by Cicero¹ and had been developed by Plato,² and perhaps by authors whose works have now disappeared. We shall see that the mediaeval theory is related primarily to the traditional ideas of the Teutonic races on government, and to the course of the history of the Teutonic empire and kingdoms. But at the same time, the theory of the Roman Lawyers with respect to the people as the

sole ultimate source of authority in the State seems to us to be clearly an undeveloped form of the theory of contract. We might call it the theory of consent, which is not the same thing as the theory of contract in any of its forms, but is the germ out of which the theory of contract might very well grow. When we discuss the theories of the mediaeval writers in detail we shall have to consider what traces there are of the direct influence of this aspect of the legal view, we shall certainly recognise that they were acquainted with it. In the meanwhile we consider the Roman Lawyers as expressing one aspect of the theory out of which the mediaeval and modern democratic conception of the State has grown.

Few phrases in the Digest are more familiar than that of Ulpian, “*Quod principi placuit, legis habet vigorem*”;¹ sometimes at least it has been forgotten that Ulpian continues, “*ut- pote cum lege regia, quae de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat.*” Few phrases are more remarkable than this almost paradoxical description of an unlimited personal authority founded upon a purely democratic basis. The Emperor’s will is law, but only because the people choose to have it so. Ulpian’s words sum up in a single phrase the universal theory of the lawyers; so far as we have seen, there is no other view known to the Roman jurisprudence. From Julianus, in the earlier part of the second century, to Justinian himself in the sixth, the Emperor is the source of law, but only because the people by their own legislative act have made him so. The matter is of such importance that we must justify this judgment by an examination of all the writers of the Digest who, so far as we have found, refer to the question.

The earliest discussion, in the Digest, of the authority which lies behind the civil law of Rome is, so far as we have seen, contained in a citation from Julianus, a jurist of the period of Hadrian and the Antonines. He is cited to illustrate the place of custom in law, and says that custom has rightly the force of law, inasmuch as law derives its authority from the people, and it is immaterial whether the people declares its will by vote or by custom.¹ It is certainly interesting to observe this uncompromising and dogmatic statement of the authority of the people in making and unmaking laws (*leges*). It might indeed be urged that *lex* is the distinctive name for the legislation of the *populus*, and that we must not therefore press the phrases of Julianus to mean that *leges* are the only forms of law. We shall presently see that Gaius, in his classification of law, distinguishes the *lex* from other forms of law: whether this distinction is here present to the mind of Julianus may perhaps be doubted; but if it is, we shall also probably judge that Julianus, like Gaius, looks upon the *lex* of the whole people as the original form of law, from which all other forms are descended.

Gaius has furnished us with a general definition of the nature of the civil law in that passage which we have had occasion to quote several times.² We must now examine the words with which he carries out the definition in detail, with regard to the Roman State.³

It might seem at first sight that there are here as many authorities as there are forms of law, but a closer observation shows us that ultimately these come back to the authority of the whole *populus*. It is they and they alone who have the power of making a *lex*, and all other authority is derived from this. Thus the *plebiscitum*, or law made by the plebs alone, without the other classes, only has the force of law because this was decreed by the *lex Hortensia*. The constitution of the prince, in the same way, has the force of law because the emperor receives his *imperium*, *per legem*. The magistrates have the *jus edicendi*, but this no doubt is derived from their election. The *Responsa Prudentium*, if they all agree, have the force of law, but this is because such an authority is given to the *jurisconsults*. The only form of law of which we cannot definitely conclude, from this statement of Gaius, that its authority can be traced back to the people, is the *Senatus consultum*. Gaius does not define the mode in which this form of law came to be recognised as such. Pomponius suggests that it was due to the growing difficulty of getting together the *populus* as the Roman population increased i¹ both he and Gaius seem to look upon the legislative authority of the Senate as tacitly recognised, though, as Gaius seems to indicate, at first there was hesitation about it.

The same theory of the source of authority is put before us in that very interesting account of the origin and development of the Roman legal system, by Pomponius, a contemporary of Gaius, to which we have just referred.² In this we have a succinct history of the Roman law from the time of Romulus down to the organisation of the Imperial system. The most important points in this are as follows. At first there was no certain *lex* or *jus* in the State, and all things were directed by the kings. Romulus first began to propose definite laws (*leges*) to the people. After the expulsion of the kings these laws went out of use, and for some time the Roman people was governed rather by uncertain usages and customs than by definite laws. At last ten men were appointed to procure laws from the Greek cities, that the State might be founded on laws (*leges*), and they were given supreme authority in the State for a year, to put these into order and to correct them if necessary, and to interpret them with such authority that there should be no appeal from them. These laws, to which the name of the laws of the Twelve Tables was given, were finally adopted. They needed to be interpreted by the great lawyers, and out of this interpretation grew up that form of *jus* connected with the *prudentes*, the *jus* which is “*proprium jus civile, quod sine scripto in sola prudentium interpretatione consistit*.” Then on the basis of these laws were founded the “*legis actiones*.” Later it came about that there was a dispute between the plebs and the *patres*, and the plebs made laws for themselves which were called *plebiscita*¹ When the plebs had been brought back and much discord had arisen with respect to these *plebiscite*!., it was finally agreed that they should be recognised as *leges*, and this was sanctioned by the *lex Hortensia*.² Then, the people growing so numerous that it was difficult to gather together the *populus*, or even the plebs, the very necessity of the case made it necessary that the Senate should be charged with the care of the State, and the Senate began to issue decrees: this form of law was known as *Senatus consultum*.³ At the same time the magistrates who declared the law issued their edicts, that the citizens might know exactly the *jus* under which cases would be decided. Finally it became necessary that one man should be charged with the care of the State; a prince was created, and he was given the authority, that whatever he should ordain should have the force of law.⁴

It is interesting to observe the laborious care with which Pomponius explains each new development in the legal system. By his presentation of the subject we see again that, with the exception of the *Senatus consultum*, every form of law derives its authority ultimately from the *populus*. This is especially important with respect to the Imperial power, and here indeed Pomponius's phrases are almost apologetic in their anxiety to account for the legislative authority of the Emperor. The historical value of Pomponius's account is of course a very different matter from its interest to us: so far, indeed, as we are concerned, this is quite immaterial; we are only concerned with his narrative as illustrating the political theory of the second century, and for that purpose it is invaluable.

Early in the third century we come to Marcianus, whose citations from Demosthenes and Chrysippus we have already examined in another connexion. We must return to the first of these in relation to our present inquiry. His words are as follows: "This is law which all men should obey for many reasons, and especially because every law is a thing found and given by God, a judgment (867/za) of wise men, a correction of voluntary and involuntary transgressions, a common agreement of the State, in accordance with which all those who are in the State should live."¹ We have already discussed the significance of the first part of this definition: for our present purposes the important phrases are two—that a law is something decreed or advised by wise men, and something adopted by the common agreement of the State. This latter part of the definition is adopted by Papinian, a contemporary of Marcianus: his definition is, with slight modification, evidently taken from that of Demosthenes.² In this definition, then, it is clear that the immediate source of the authority of the law of any State is the agreement of the whole State, and we may take it that it governs the short general description of the civil law given by Papinian in another place, where he deals with it in very much the same terms as Gaius:³ we are entitled to interpret this classification by the definition to which we have just referred.

We have, then, come down to the time of Ulpian, with whose sentence on the Imperial authority we commenced our inquiry. We are now in a position to recognise that his statement, that the authority of the prince is derived from the fact that the people have by the *lex regia* conferred on him all their authority, is strictly in harmony with the political theory of all the earlier jurists. But we can trace the same theory down to the time of Justinian himself. In a rescript of Theodosius and Valentinian of the year 429, the relation of the Imperial authority to the law is expressed in very clear and forcible terms. Theodosius and Valentinian say that the prince is bound by the laws, for his authority is drawn from the authority of the law.¹ Nothing could well be plainer than this statement, nothing could show more clearly that the theory of Ulpian is still the theory of the fifth century. And, finally, in the rescript which is prefixed to the Digest, we find Justinian himself referring in explicit terms to the ancient law by which the Roman people transferred all their authority and power to the Emperor.²

It is true that in Justinian we also find some trace of a conception out of which there grew another theory of the authority of the ruler. The first words of the rescript we have just quoted are, "*Deo auctore nostrum gubernantes imperium, quod nobis a caelesti maiestate traditum est.*"³ In another rescript, also prefixed to the Digest, we read, "*quia ideo imperialem fortunam rebus humanis deus praeponit, ut possit omnia quae noviter contingunt et emendare et componere et modis et regulis competentibus tradere.*"⁴ In another place still, he speaks of God subjecting all laws to the Emperor, whom He has

given to men as a living law.⁶ These phrases may be compared with those of Seneca and Pliny, to which we have already referred,⁶ and with the patristic conception of the relation between God and the ruler, which we shall presently have to examine; but in themselves the words of Justinian can hardly be pressed to mean more than that the providence of God rules even over the matters of the State.

From the second century, then, to the sixth, we have seen that the Roman law knows one, and only one, ultimate source of political power, and that is the authority of the people. It may of course be said that this is the merest abstract theory, that during this time the Imperial power was obtained by every method, but never by that of popular appointment; that the legislative authority of the people was only a name and a pretence, and it must be noticed that Justinian seems even to speak of the Emperor as the sole¹ legis lator, as though, in fact, the legislative action of the Roman populus had wholly ceased. But still the theory of the ultimate authority of the people subsisted, and so came down till it touched the new Teutonic theory of law and political authority, a theory which again knew nothing of any legislative authority in the State apart from the whole body of the State.

We think that the legal theory, that all political power is derived from the people, is at least one of the sources from which the theory of the social contract sprang. It is far from being the same theory, but it seems to us to represent an elementary form of the same conception. The Roman lawyers indeed usually deal with the matter only from the point of view of the Roman Commonwealth, but this is not always the case. Papinian, and Marcianus in his citation from Demosthenes,² define law in terms of universal application. And, after all, the Empire was to the Roman much the same as the world. The principles which belonged to it were at least the principles of the civilised world, and their application to the conditions of the world at large was natural and easy.

CHAPTER VII

THE POLITICAL THEORY OF JUSTINIAN'S INSTITUTES.

WE have so far examined mainly the jurists of the second and third centuries, and have endeavoured to make ourselves clear as to the general character of the political theory which they represent. We have observed that their theory is not something fixed, but that we can trace the changes of legal opinion, in the course of these centuries, with regard at least to some subjects. It is for our purpose important that we are able to compare these views with those of the lawyers of the sixth century as embodied in the Institutes of Justinian. From such a comparison we are able to arrive at some conclusions with regard to the permanent tendencies of the legal traditions, to judge, with respect to certain of them, which ultimately tended to predominate. It must at the same time be confessed that the compilers of the Institutes were so anxious to express themselves in the phrases of the great lawyers of the second and third centuries that it is often difficult to be quite certain as to their own opinions. It is difficult to imagine that the compilers were not aware that the passages they quote from different writers often represent views inconsistent with each other, and yet they do actually sometimes join together in the same passage citations which are completely out of harmony.

This carelessness of construction is nowhere more noticeable than it is with reference to the theory of the law of nature. We think that the opinion of the authors of the Institutes on the subject is clear and distinct, but it must be admitted that occasionally

they embody in their work phrases which belong to another view. Their general position will be sufficiently

shown by a few sentences: "Dicendum est igitur de jure private, quod est tripartitum ; collectum est enim ex naturalibus praeceptis aut gentium aut civilibus."¹ This dogmatic statement of the threefold character of law is followed by the definition of the *jus naturale* which is cited in the Digest from Ulpian, and then by the definition of the *jus gentium* from Gaius's Institutes, and a description of the *jus civile* ;² they add that account of the *jus gentium* which we have had occasion to notice before.³

The fact that the compilers of the Institutes follow Ulpian in distinguishing the *jus gentium* from the *jus naturale* is certainly clear enough. It is true that the first two passages we have just mentioned are quoted directly from Ulpian, but the last mentioned is not taken from any known source (with the exception of the words, "Jure enim naturali ab initio," &c.) We have already suggested that it may be related to that passage from Hermogenianus⁴ which we have already mentioned, but the explanation of the origin of the institutions is not contained in the passage from Hermogenianus, as we have it in the Digest. At any rate, whether these phrases are wholly borrowed or partly original, they do very clearly show that the compilers of the Institutes distinguished between the *jus naturale* and the *jus gentium*, and the last passage gives us some indication of their conception of the nature of the distinction.

Before we discuss the meaning of the *jus naturale* in the Institutes, we must examine one passage which seems directly to contradict those which we have just considered. This passage is contained in the first title of the Second Book of the Institutes, a title which deals with certain general questions of property.⁶ This passage is evidently founded upon those words

of Gaius's in the Digest, which we have already several times had occasion to quote,¹ but the compilers of the Institutes have made several important changes. In the first place, they have substituted the words "*jure naturali, quod sicut diximus appellatur jus gentium*" for Gaius's words, "*jus gentium, quod ratione naturali inter omnes homines peraeque servatur.*" Next, they have written "*Palam est autem vetustius esse naturale jus, quod cum ipso genere humano rerum natura prodidit*" in place of Gaius's "*Et quia antiquius jus gentium cum ipso genere humano rerum natura proditum est*"; and finally, they have added the last clause. The two latter points are interesting, but the real difficulty is raised by the first sentence.

We have just seen that the authors of the Institutes separate the *jus naturale* from the *jus gentium*. It is difficult to understand what they can mean by saying that the law of nature is called the *jus gentium*: they not only say this, but add that they have said it already, while we can find no trace of any such statement in the earlier parts of the Institutes. The form of the statement suggests that we may have here a quotation from some otherwise unknown source. We can only conjecture either that this is the explanation of the phenomenon, or that this is to be found in the fact that the passage forms part of a title which deals with the theory of property, consisting for the most part of citations from Gaius, Marcianus, and other jurists who identify the *jus naturale* and the *jus gentium*, and that the editors have adapted their language to this fact. The statement is certainly perplexing, but it seems impossible to allow this phrase to change the conclusion which we derive from the clear and repeated statements which we have

already examined. There can be no doubt that normally the authors of the Institutes did distinguish the *jus naturale* from the *jus gentium*.

Their formal definition of the *jus naturale*² is, as we have seen, the same as that of Ulpian, — that is, they reproduce that definition which suggests that the *jus naturale* means little more than the instincts common to all animals. But whatever may be the case with Ulpian, this definition does not appear to present at all a complete account of the view of the authors of the Institutes. At the close of the same title they use phrases descriptive of the *jura naturalia* which seem to convey quite another conception, the conception of their divine and immutable character.¹ The matter may be illustrated from other passages. In the Third Book of the Institutes we find a phrase of much significance.² The “ natural laws ” here are equivalent to permanent and divine principles of life which are superior to the civil law, and to which the civil law ought to be conformed. In the same title we find the action of the praetor, in admitting emancipated children to a share in the inheritance of their parents, described as being due to the sense of “ *naturalis sequitas*. ”³ Again, the same title and the next, in dealing with the changes of the law of succession in relation to females and their representatives, describe certain changes in the civil law as being due to the feeling that the old law was contrary to nature and to the inspiration of a humaner sense.⁴ Natural laws are divine and ought to govern and correct all other forms of law, for they represent the permanent principles of justice and humanity. This is evidently quite another view of the *jus naturale* from that which may seem to be expressed in the formal definition of Ulpian which the Institutes cite. It would appear, then, that whatever uncertainty we may feel as to the meaning attached to the *jus naturale* by Ulpian and his contemporaries, by the sixth century the phrase was certainly taking that meaning which it has throughout the Middle Ages and later—that is, that the *jus naturale* means that body of principles of justice and reason which men can rationally apprehend, and which forms the ideal norm or standard of right conduct and of the justice of social institutions.

We do not mean that the authors of the Institutes had arrived at any perfectly clear judgment on the matter,—on the contrary, the fact of their reproducing Ulpian’s definition shows us sufficiently clearly that this was not the case,—but we think that the tendency of their thought is clear enough, that they show us the development of a conception which in the second century was still unformed and indistinct. We have seen that the *jus gentium* was by Gaius conceived as embodying the principles of justice and reason, that indeed the *jus gentium* in Gaius is practically the same thing as the *jus naturale* in Cicero. The conception, therefore, of a principle of law, apprehended by reason as lying behind all positive law and embodying the principles of justice and reason, was not new. The new thing was simply the distinction between this ultimate law and the *jus gentium*.

We have already considered the question of the causes which led to this distinction. We think that in the main it must have arisen from the judgment that certain institutions, which were actually universal, could not be looked upon as having been primitive or natural in the full sense of the word. It is round the question of slavery that this distinction, as far as our evidence goes, seems to take shape in the legal writings, and this, again, seems to be related to the question of natural equality. But the conception could be extended easily to other conditions and circumstances of life. The distinction between the *jus naturale* and the *jus gentium* seems, then, to be very clearly

related to the distinction between the primitive state of nature and the conventional organisation of society. The writers of the Institutes do not deal with this directly and explicitly, but in two passages at least they seem to come a good deal nearer to it than any writer cited in the Digest, with the possible exception of Hermogenianus. We have already quoted these passages, but must do so again. The first comes after the definition of the tripartite law, and resumes the description of the *jus gentium*, which had been first given in the words of Gaius. This passage, which, as we have already mentioned, is not drawn from any known source, though it reminds us of Hermogenianus, seems quite clearly to imply a contrast between the primitive conditions of human life and the time when the conditions and institutions referred to came into existence.¹ The other phrase comes at the end of that passage which we have already mentioned in discussing the relation of the *jus naturale* and the *jus gentium*.² In this passage, as we have already seen, the authors of the Institutes have spoken of the *jus naturale* and the *jus gentium* as being identical, and therefore the primitive condition is not thought of under terms which belong in any exclusive sense to the *jus naturale*. But the writers of the Institutes do seem clearly to conceive of a time when States did not exist, nor magistrates, nor written laws. That is, they seem to contrast the primitive conditions of human life, in which such institutions as those mentioned did not exist, with the later time when they did.

The treatment of slavery in the Institutes is the same as that in Ulpian, Tryphoninus, and Florentinus ; indeed, with the exception of the words, “ *bella etenim orta sunt, et captivitates secutae, quae sunt juri naturali contrariae*,”³ they simply reproduce the phrases of Ulpian and Florentinus, “ *Jure enim naturali ab initio omnes homines liberi nascebantur*,”⁴ and “ *Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subicitur*.”⁶

We need not say anything as to the theory of property in the Institutes: it does not seem to differ in any way from that presented in the Digest. The compilers simply put together in shorter form the same views as those which we have seen to be generally held by the jurists of the second and third centuries. They throw no further light on that interesting passage from Hermogenianus on which we have commented.

And again we find the same thing to be the case with regard to the theory of the relation of the civil law to the general principles of law : the writers of the Institutes begin their own treatise with Ulpian's definition of justice and of the general character of jurisprudence,¹ but they add nothing. And so, again, with regard to the source of the authority of the civil law. They define the varieties of the civil law and the source of their authority mainly in the words of Gaius and of Ulpian.² They represent the same tradition which we have seen to be characteristic of all the legal theory of Rome from the second century to Justinian, that the Roman people are the ultimate source of the authority of the civil law of Rome.³

The Institutes then furnish us with valuable information as to the development of the theories of natural law and the natural state between the second century and the sixth, and seem to show us that, with regard to the other subjects into which we have inquired, the legal theory continues during these centuries unchanged.

Looking back now on our examination of the political theory of the Roman lawyers, we feel it in the first place important to observe how very small a place such theory occupies in their work. We have been compelled to take up a considerable space in our discussion

of this, but that is simply due to the fact that the subject is obscure, and that there are many points whose interpretation presents some difficulties. The references of the lawyers to the theory of politics are few in number, and somewhat slight, if not superficial, in character. We cannot pretend to think that the lawyers contributed much to the philosophy of the State by their own reflections, but in reproducing the theories current among intelligent men they probably did much to give them a precise and definite character, and the mere fact of the embodiment of such theories in the technical law-books could not but give them a new importance and influence. The influence of the lawyers in the development of political theory was probably quite out of proportion to their actual capacity as political thinkers. Their importance for our purpose is obviously very great: the period to which they belong is one in which there seems to have been very little formal writing on political theory, or else the works which may have dealt with this have disappeared. The lawyers furnish us with the best materials for estimating what was the general tendency of political theory during these centuries, apart from the Christian influences. When we turn to the Christian Fathers we shall find that they provide us with much information on our subject, but if we were to go to them without first examining the views of the lawyers, we should have some difficulty in discriminating between conceptions which belong to the Christian tradition and those which were the common property of the Roman world. The influence of the jurists upon mediaeval political thought is very great, certainly very obvious, and while, as we shall see, the relations between mediaeval thought and the Roman jurisprudence may often be somewhat superficial, yet its influence is so constant, both directly and through the gradually growing and developing body of the Canon Law, that some study of the Roman law is necessary as a preliminary to any complete examination of mediaeval ideas.

If now we consider what are historically the most important elements in the political theory of the Roman lawyers, we shall be inclined to say that first in order of significance comes their contribution to the theory of the natural law and the natural state. We have seen how these conceptions take shape or are implied in the writings of the jurists of the second century, and are by them transmitted to those of the sixth. We have seen that these conceptions seem to be related to some judgment, instinctive perhaps rather than fully reasoned, that some actual institutions of society cannot be thought of as being strictly in harmony with the primitive conditions of human life, which are also conceived of as representing some ideal system of justice. We have seen that through Ulpian, Tryphoninus, and Florentinus the theory of the natural equality and liberty of mankind passed into the system of the Roman law, and it can hardly be doubted that this fact was not without a powerful influence upon the course of speculation on the theory of human institutions.

Secondly, we think it is probable that the influence of the lawyers on future times was greater than we might at first think with respect to the theory of the relation of law and the ultimate principle of justice. They contributed at least to fix for many centuries in the minds of men the conviction that the civil law of any State represents the practical application of the principles of justice and reason. Cicero and the Stoics indeed had maintained this view with clearness and conviction; but whether it would have become predominant apart from the influence of the jurists may perhaps be doubted. When we come to discuss the theory of St Augustine, we may have occasion to observe some signs of another view.

And, finally, we think that in the conception of the Roman lawyers as to the source of authority in the State we probably have one foundation of the mediaeval and modern theory of democracy. We shall have to study the immediate sources of this in later chapters of this volume, and in the next volume we shall have to examine the mediaeval conception in detail, and shall then be in a position to estimate more precisely the importance of the contribution of the Roman lawyers to the development of modern democratic theory. But in the meanwhile it is at least well worth observing that, if the ancient civilisation ended in a system of monarchical though legal absolutism, yet the theory of government which the jurists of the old world handed down to the new was a theory in which all authority in the State is conceived of as coming from the people.

PART III.

THE POLITICAL THEORY OF THE NEW TESTAMENT AND THE FATHERS.

CHAPTER VIII.

THE POLITICAL THEORY OF THE NEW TESTAMENT.

WE have so far been engaged upon an inquiry into the political theory of the ancient world, in its last stages indeed, but as unaffected by any of those new conceptions which may have come into it with Judaism and Christianity. We have now to consider the leading features of the political theory of the West as we find it in the Christian writers of the first six centuries of our era. We have to consider what contributions the new mode of thought actually made to the general stream of political and social ideas, how far it simply coincided with these, how far it may have changed them, and how far, even when it did in the main correspond with them, it may have tended to give these ideas a new form or a new force.

Historians have often spoken in general terms of the far-reaching effects of Christianity in changing men's conceptions with regard to the character, the purpose, and the ruling principles of human society, and no doubt the influence of Christianity upon these has been profound and far-reaching, but we think that we have already said enough to show that if we are to arrive at any just and well-grounded judgment upon this question, we must be at pains to discriminate very carefully those elements of the theory of Christian writers which are really original to them, and those in which they do but reproduce the opinions already current in the civilised world. There are, no doubt, certain elements of political and social theory which are distinctive of the Christian writers, but we shall have to recognise a little more distinctly than has always been done that very often they are simply drawing from the common stock of ideas current in their times.

We must begin by considering the significance and scope of the references to the theory of human nature and society in the New Testament. But behind the New Testament there lies the literature of the Old Testament, whether belonging to the earlier history of Israel or to the period between the Exile and the advent of our Lord. It is especially in the literature, whether canonical or apocryphal, of this later period, that we have to look for the explanation of many of the phenomena of New Testament theory: unhappily the field is as yet but very imperfectly explored. The obscurity of the period indeed corresponds in time and in importance with the parallel obscurity of the period between Aristotle and Cicero, and until more light has been thrown upon these centuries, much in the New Testament will remain difficult to understand, and still more difficult to explain with reference to sources and origins. Among the many obscurities of our subject,

perhaps the most obscure and perplexing are the questions which arise as to the contact between Jewish and Hellenic ideas, and the influence which the latter exercised upon the former. The importance of the subject has long been recognised with regard to the interpretation of St Paul's conception of religion and the world, but it may be much more important with regard to the whole of the New Testament than we yet understand.

We find in the New Testament matter of importance with regard to the theory of natural law, the theory of human equality, the theory of property, and the theory of government. We begin by examining the theory of natural law.

The references to this theory in the New Testament are very scanty—indeed we have not observed any distinct reference to the subject, except in one passage in St Paul's letter to the Romans; but this reference is very clear and distinct, and may be taken as presenting a conception which is constantly assumed by St Paul as true and important. The passage occurs in a very important and indeed fundamental discussion of the relation to God of the Gentiles who have not received a revealed law from God: "For as many as have sinned without law shall also perish without law : and as many as have sinned under law shall be judged by law; for not the hearers of a law are just before God, but the doers of a law shall be justified: for when Gentiles which have no law do by nature the things of the law, these, having no law, are a law unto themselves ; in that they show the work of the law written in their hearts, their conscience bearing witness therewith."¹

There can be little doubt that St Paul's words imply some conception analogous to the " natural law " in Cicero, a law written in men's hearts, recognised by man's reason, a law distinct from the positive law of any State, or from what St Paul recognised as the revealed law of God. It is in this sense that St Paul's words are taken by the Fathers of the fourth and fifth centuries like St Hilary of Poitiers, St Ambrose, and St Augustine,² and there seems no reason to doubt the correctness of their interpretation. It would be an interesting question to discuss the source of this conception in St Paul; how far it came to him from the presumably Hellenic culture of his youth at Tarsus, how far from the general stock of ideas current among the more educated Jews. For our purpose it is sufficient to observe that we find the conception in the New Testament. We have already considered its character in the writings of Cicero, and the development of the conception among the jurists of the second and third centuries. We shall have to consider it again in the Christian Fathers.

We turn to the theory of human nature and equality in the New Testament, and first to this as presented in the teaching of our Lord in the Gospels. Whatever questions may be raised as to the universalist and particularist aspects of the Gospels, it will, we think, now be admitted by all critics that the doctrine of our Lord must have contained the germs of that universalism which ultimately predominated in the Christian Church. It is evident that more or less clearly our Lord must have taught the doctrine of the universal fatherhood of God, that in His eyes the distinctions of Jew and Gentile were not fundamental nor permanent. The Jewish people are warned that " many shall come from the east and from the west, and shall sit down in the kingdom of heaven with Abraham, and Isaac, and Jacob," while the children of the kingdom, the people of Israel, are shut out.¹ This is only one example of a conception which is continually making itself felt in warnings to the Jews, and in the expression of the universal compassion and mercy of God.

The same conception is expressed in set terms by St Paul, "There can be neither Jew nor Greek, there can be neither bond nor free, there can be no male and female: for ye all are one man in Christ Jesus";² but this aspect of St Paul's teaching is too well known to need any detailed exposition. It is perhaps interesting and worth while to notice that the author of the Acts of the Apostles represents St Paul as expressing the conception of the universal fatherhood of God in the terms of a Stoic philosopher and poet, "For in him we live, and move, and have our being; as certain even of your own poets have said, For we are also his offspring."³ The doctrine of St Paul with regard to the common relation of all mankind to God is the same as that of the later philosophers.

We find, then, as characteristic of the Christian faith, that same conception of the identity of human nature over all the world which we have already considered in Cicero and Seneca. We cannot here enter into the question of the history of this conception in the later Judaism. We can see that among the Palestinian Jews there was still in St Paul's time a strong conservative party which looked upon these sentiments with suspicion. Apart from all the critical disputes as to the relation of St Paul to Jewish Christians, there can be little doubt that it was the form of his universalism which, more than any other cause, tended to concentrate upon him the anger of the Jews.

There are indeed traces in Hebrew literature from an early date of a tendency to transcend the national principle in religion. Both in the first and the second parts of Isaiah, in connection with the expectation of the deliverer and restorer, there is expressed, however vaguely, the sense that his work will transcend the limits of the people of Israel, that it will be his work to establish righteousness and equity for all mankind, and to extend the knowledge of God over all the world.¹ How far these ideas grew and developed during that most obscure period which followed the return from the great captivity, how far the nationalism of the Jews may have revived under the stress of the resistance to Hellenism under the Maccabees, how far the contact with Hellenism, even when resisted, may have yet actually tended to break down the Judaic isolation,—all this is a subject still obscure and perplexed. That our Lord took up again the tradition of the great prophets, and, translating it into a new form, gave it a profound and permanent life, seems clear, as is also the fact that St Paul carries on the doctrine of our Lord. The Christian Church then set out on its history with a conception of human nature which had outgrown the sense of national limitations, a conception which coincided very closely with the conception of the contemporary philosophy.

We shall therefore not be surprised to find that the treatment of slavery, and its relation to human nature, in the New Testament, is very closely analogous to that of the writers whom we have hitherto considered. We have a series of interesting passages which deal with the subject in St Paul's writings, and while these leave a good deal obscure, yet they enable us to form a fairly clear conception of the principles which from the first dominate the attitude of the Christian Church towards the institution of slavery.

The earliest reference to the subject by St Paul is contained in that passage which we have already considered,² in which St Paul speaks of the distinction between slave and freeman as one which has no meaning in relation to God. This evidently does not mean that Christianity has made the institution of slavery unlawful, but simply that it has no significance in God's sight,—that the slave, just as much as the freeman, is capable of the religious life, capable of knowing

God and of the life of the child of God. We might translate St Paul's phrase into other terms,—the slave is possessed of reason and capable of virtue. St Paul would obviously have emphatically repudiated the notion that there is a natural or inherent distinction in human nature, which renders some men capable of the higher life, while others must remain upon a lower level. The passages in the Corinthian and Colossian¹ letters to which we referred are strictly parallel, but add nothing further.

In the letter to Philemon we have a practical commentary on this conception, and we have a further development of St Paul's principles with regard to slavery. St Paul sends a certain Onesimus back to his master Philemon, from whom he had apparently escaped. He had fallen in with St Paul and been converted to Christianity. It is very noteworthy that St Paul felt it right to send Onesimus back to his master, and does not even suggest that Philemon should set him at liberty. On the other hand, St Paul expects Philemon to receive Onesimus not as a mere slave, a runaway to be punished, but as a beloved brother. The epistle seems to illustrate clearly two principles: that slavery is not in St Paul's mind unlawful, but that the condition of slavery is only external—that it has no existence in the moral and spiritual life.

We have another reference to the subject in the first letter to the Corinthians, which would be extremely interesting if we could be more confident as to its meaning: "Let each man abide in that calling wherein he was called. Wast thou called being a bond-servant? care not for it: but if² thou canst become free, use it rather. For he that was called in the Lord, being a bond-servant, is the Lord's freedman: likewise he that was called, being free, is Christ's bond-servant. Ye were bought with a price; become not bond-servants of men. Brethren, let each man, wherein he was called, therein abide with God."¹ One general conclusion can clearly enough be founded upon this passage, namely, that in relation to Christ it is completely indifferent whether a man is a slave or a freeman. But when we ask ourselves, Does St Paul in this passage advise a man to get his freedom if he can, or does he rather urge upon him that the whole thing is so unimportant that it is not worth while taking steps to obtain his freedom? we find ourselves in much uncertainty, and can hardly express any decided opinion.

Another aspect of St Paul's conception of slavery is presented to us in two passages, obviously parallel to each other, but not identical. We may take first that in the letter to the Ephesians: "Bond-servants, be obedient unto them that according to the flesh are your masters, with fear and trembling, in singleness of your heart, as unto Christ; not in the way of eyeservice, as men-pleasers; but as bond-servants of Christ, doing the will of God from the heart; with good will doing service, as unto the Lord, and not unto men. . . . And, ye masters, do the same things unto them, and forbear threatening: knowing that both their Master and yours is in heaven, and there is no respect of persons with Him."² St Paul's phrases are very general in their character, but three conclusions may be drawn from them. First, that he looks upon the performance of his work by the slave as a duty in the sight of God. Secondly, that before God the master and the slave are on the same level. Thirdly, it is probably safe to interpret St Paul's injunctions to the masters, "do the same things unto them," as meaning that they are to behave towards their slaves with fairness. Perhaps we may find the best commentary on these words in the parallel passage in the letter to the Colossians: "Bond-servants, obey in all things them that are your masters according to the flesh: not with eye-service, as men-pleasers, but in

singleness of heart, fearing the Lord: whatsoever ye do, work heartily, as unto the Lord, and not unto men; knowing that from the Lord ye shall receive the recompense of the inheritance: ye serve the Lord Christ. For he that doeth wrong shall receive again for the wrong that he hath done: and there is no respect of persons. Masters, render unto your bond-servants that which is just and equal; knowing that ye also have a Master in heaven.”¹ The first part of this passage is substantially the same as that in the Ephesian letter, but in the last sentence there is a change of phrase of some interest. Instead of “Masters, do the same things unto them,” we have, “Masters, render unto your bond-servants that which is just and equal” (TO Zucaiov Kai TTJV lo’OTiyra”). The words are a little vague, but at least they seem clearly to express the principle that justice and fairness is a quality which ought to belong to the relation of master and slave, that a man’s actions in this relation ought to have the same quality as that which belongs to the other relations of life. We are reminded of Cicero’s phrase, “*Meminerimus autem etiam ad versus infimos justitiam esse ser vandam. Est autem infima condicio et fortuna servorum.*”²

St Paul’s attitude to the question of slavery is obviously founded upon his conviction that all men are at least morally and spiritually equal in character. To him all men are in God’s sight equal, distinctions of condition belong only to the outer man, men are to each other brothers. The conduct of masters towards their slaves must be governed by the same principles of equity and fairness as those which govern their relations to other men. We can hardly say that St Paul goes beyond the position of Cicero or Seneca as to the natural similarity and equality of human nature, or beyond Seneca in his judgment that slavery is a condition which only affects the outer character of the man. His theory of human nature is indeed very similar to theirs, and his attitude towards slavery is much the same. Seneca indeed goes somewhat further than St Paul when he recognises that slavery is to all men hateful and burdensome;³ as we have seen, St Paul’s attitude towards the question of the advantages of emancipation is uncertain. If St Paul’s conception of slavery was to have a greater influence on the future of that institution, we must probably conclude that this was due to the fact that St Paul’s judgment dominated the thought and the practical tendencies of the Church, while Seneca’s was but the sentiment of an individual, representative probably of a very general judgment, but not enforced by an organised common judgment.

There are two references to the subject of slavery in the “Pastoral” epistles, but they illustrate not so much the theory of slavery as the relation of the writers of the New Testament to anarchical and disorderly elements in the primitive Church, which were probably of much greater importance than we have hitherto recognised. We shall have to deal with the matter immediately in connection with the theory of government in the New Testament. The passages are in the first letter to Timothy, and in the letter to Titus.¹ The writer of the letters exhorts the slaves to honour and obey their masters, and particularly not to despise their masters if they also were Christians. We may probably infer that the writer felt that there was some danger lest the new sense of spiritual dignity, and of spiritual relation between Christians of all conditions, should tend violently to destroy the old social order: he is afraid lest the conduct of Christian men should bring discredit or suspicion upon the religion of Christ.

We turn to the theory of the institution of government, and here we find certain conceptions whose importance in the history of later political thought is very great indeed. The most important passage in the New Testament which is connected with this subject is that in the thirteenth chapter of St Paul's epistle to the Romans. "Let every soul be in subjection to the higher powers : for there is no power but of God ; and the powers that be are ordained of God. Therefore he that resisteth the power withstandeth the ordinance of God: and they that withstand shall receive to themselves judgment. For rulers are not a terror to the good work, but to the evil. And wouldest thou have no fear of the power ? do that which is good, and thou shalt have praise from the same: for he is a minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is a minister of God, an avenger for wrath to him that doeth evil. Wherefore ye must needs be in subjection, not only because of the wrath, but also for conscience' sake. For for this cause ye pay tribute also; for they are the ministers of God's service, attending continually upon this very thing. Render to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour."¹

This passage, which is of the greatest importance throughout the whole course of mediaeval political thought, being indeed constantly quoted from the second century onwards, is indeed pregnant and significant in the highest degree. It defines in the profoundest way the Christian theory of the nature of political society, while it furnishes us with the most interesting evidence with regard to the condition of the Christian societies of the apostolic period.

St Paul's general meaning is plain and distinct. The order of civil government is of divine institution, a thing deriving its authority and sanction from God Himself; to refuse to submit to it is to refuse to submit to God; obedience to the State is not merely a political necessity, but a religious obligation. But, we may ask, why is this so ? Why are we to take the civil order of the State to be a divine institution, to which we must render obedience as to God Himself ? Here also St Paul's answer is clear and distinct; it is because the end and purpose of civil government is to repress the evil and to encourage the good. The civil ruler is God's servant for a good purpose ; the good man need have no fear of the civil ruler, but only the evil man. To put this into the more technical phrases of political theory, St Paul means that we must obey the civil order, as having a divine authority, because it exists for the maintenance of justice. It is the just end of the civil State which gives it a sacred character.

There are some other passages of importance which should be considered along with this one. In the letter to Titus² we have an exhortation in general terms to obedience to authorities, and in the first letter to Timothy Christian men are exhorted to pray "for kings and all that are in high place; that we may lead a tranquil and quiet life in all godliness and gravity."¹ The position of the ruler is defined clearly, along with the ground of the attitude of Christian men towards him, namely, that it is his function to secure order and peace for society.

In the first letter of St Peter we have a more complete parallel to the phrases of St Paul in the Roman letter. "Be subject to every ordinance of man for the Lord's sake: whether it be to the king, as supreme; or unto governors, as sent by him for vengeance on evil-doers and for praise to them that do well. For so is the will of God, that by well-doing ye should put to silence the ignorance of foolish men: as free, and not using your freedom

for a cloke of wickedness, but as bond-servants of God. Honour all men. Love the brotherhood. Fear God. Honour the king.”² We have here the same conception as that of St Paul, that the authority of the ruler is divine, that obedience is to be rendered to him for the Lord’s sake; and the same explanation of this, as resting upon the fact that the function of the ruler is to punish the evil and to reward the good. But the passage is also interesting as suggesting to us some explanation of the urgency with which St Paul and the writer of this letter deal with the matter: for our purposes it is immaterial whether the author is, as we should judge probable, St Peter, or some other and later writer.

We might very well at first sight wonder what it is that leads St Paul and St Peter to insist upon such an obvious truism as that the honest man should respect and obey the civil power. The first explanation which offers itself is, that they are anxious to counteract some Jewish antipathy to the Roman rule, and the explanation is consistent with the character of the persons to whom the letter to the Romans and the letter of St Peter are addressed. It is fairly clear that the Roman Church, when St Paul wrote, consisted partly of Jewish, partly of Gentile Christians, and it would seem that the letter of St Peter may be addressed mainly to Jewish Christians.³ It is indeed most probable that the Christian teachers were compelled at an early date to deal with this question of the relation of the Church to the Roman Government. The Jewish religious and political leaders had evidently tried to entangle our Lord in the difficult questions relating to the Jewish nationality and the Roman Empire. There can be no mistake about the purpose of the question with regard to paying tribute to Caesar;¹ it was obviously intended to involve our Lord in a charge either of want of patriotism, or of disloyalty to the Roman Government. The apparent failure of the attempt evidently did not prevent the Jewish authorities from bringing the latter charge against our Lord. It is true that only St Luke’s gospel actually records the definite form of the charge, “We found this man perverting our nation, and forbidding to give tribute to Caesar, and saying that he himself is Christ a king;”² but it is clear from all the accounts of the trial before Pilate that some such charge must have been made. The common tradition of all the narratives represents Pilate as asking our Lord whether he claimed to be the King of the Jews,³ and there seems therefore to be nothing improbable in St John’s statement that it was by pressing the charge of disloyalty that the Jewish leaders were able to coerce Pilate into ordering our Lord’s crucifixion.⁴ Our judgment is confirmed by the account of the inscription placed upon the cross.⁶ There is some evidence that this same charge of disloyalty was brought against the Christians in the later part of the first century. According to the author of the Acts of the Apostles, the Jews at Thessalonica tried to embroil the newly founded Christian community in that city with the authorities, by bringing against them a charge closely connected with that brought against our Lord. “These that have turned the world upside down are come hither also; whom Jason hath received: and these all act contrary to the decrees of Ceesar, saying that there is another king, one Jesus.”⁶ There may be some trace of charges of the same kind in the narrative of the incidents

at Philippi,¹ and in the charges brought against St Paul at Caesarea.²

The Apocalypse also furnishes us with clear evidence that, as a matter of fact, the Jewish hatred of the Roman Government was at one time, and in some circles, common among Christian men, when Rome first turned from its early indifference and careless protection, and became the violent enemy of the Christian societies. Without entering

into any discussion of the interpretation of the Apocalypse as a whole, or any criticism of its sources, it is at least obvious that we have in it an expression of the most intense hatred of the Roman oppressor, which, even if it were Jewish in its original form, has been adopted by a Christian writer. It may of course be urged that this represents the feelings of one section only of the Christian community ; but even if this is so, the fact that such sentiments were current in any section of the Christian societies must be taken into account in considering the position of their leaders.

It is thus very possible that these leaders were compelled at a very early date to deal with the question of the relation of their converts to the Roman Government, and the suggestion is a reasonable one, that we might interpret the passages whose significance we are discussing, as being primarily intended to check any tendency on the part of the members of the Christian communities to adopt the national Jewish attitude towards the Roman Government.

But we do not think that this explanation is really adequate to the interpretation of these passages. They seem to have some more general significance; there is no trace in them of any special reference to a Jewish attitude towards the Roman Government, such as we might reasonably expect to find were they intended primarily to detach Christian men from a Jewish nationalism. We think that the full explanation of these phrases must be found in a characteristic of the early Christian societies, of which there are numerous traces in the apostolic letters, and which St Peter seems to indicate in the passage we have quoted: “ For so is the will of God, that with well-doing ye should put to silence the ignorance of foolish men : as free, and not using your liberty for a cloke of wickedness, but as bond-servants of God.” ¹

The freedom of the Christian man is one of the most important of the conceptions of St Paul: “ With freedom did Christ set us free: stand fast therefore, and be not entangled again in a yoke of bondage.”² We have just seen that St Peter’s epistles also recognise freedom as a true characteristic of the Christian. Even St James uses the name of freedom, whatever may be the precise meaning which he attaches to the phrase.³ But it is also evident that the doctrine of the freedom of the Christian man was attended in the primitive Church with the same difficulties as in later times; indeed we venture to think that it was precisely in primitive times that the difficulties and dangers attending upon the conception made themselves most urgently felt.

It requires only a slight study of the apostolic writings to perceive that if the early Christian teachers had hard work to overcome the traditional legalism of the Jew, they were confronted with an almost equally dangerous tendency to anarchism, especially no doubt among their Gentile converts. The tendency shows itself first in a disposition to slight the ordinary duties of life, to refuse submission to the discipline of the common life. “ We exhort you, brethren,” St Paul says in his first letter to the Thessalonians, “ that ye abound more and more [in works of love]; and that ye study to be quiet, and to do your own business, and to work with your own hands, even as we charged you.”⁴ And again, “We exhort you, brethren, admonish the disorderly.”⁵ And so again in the second letter, “ Now we command you, brethren, in the name of our Lord Jesus Christ, that ye withdraw yourselves from every brother that walketh disorderly, and not after the tradition which they received of us. For yourselves know how ye ought to imitate us: for we behaved not ourselves disorderly among you; neither did we eat bread for nought at any man’s hand, but in labour and travail, working night

and day, that we might not be a burden to any of you. . . . For even when we were with you, this we commanded you, If any will not work, neither let him eat. For we hear of some that walk among you disorderly, that work not at all, but are busybodies. Now them that are such we command and exhort in the Lord Jesus Christ, that with quietness they work, and eat their own bread.”¹ It would appear that in the Thessalonian church a number of persons had so interpreted the Christian spirit of freedom, and the Christian consciousness of the dignity of the spiritual relation of man to God, that they were disinclined to submit to the ordinary duties of life, and to any kind of human authority.

The same tendencies, if under slightly different forms, exhibit themselves in the Corinthian church. It is clear from any examination of the letters to this church that St Paul had a very real difficulty, especially with his own Gentile converts, to persuade them that the liberty of the Christian man did not mean a complete emancipation from all discipline and order in life. It is clear that some at least of the Corinthian Christians were inclined to press the principle of the indifference of external rules and forms to the point of a complete disregard of the principle of that mutual subordination of desires and actions which alone makes social life possible. “All things are lawful”² seems to have been the catchword of this tendency. St Paul argues that, while it is quite true that the Christian man is free from the legal principle in life, he must remember that his conduct must be governed by the fundamental principles of society, the principles of mutual love and consideration. “All things are lawful; but all things are not expedient. All things are lawful; but all things edify not. Let no man seek his own, but each his neighbour’s good.”³ And so with regard to those spiritual gifts which St Paul and the Corinthian Christians firmly believed that they possessed, St Paul tries to persuade them that not the more remarkable and conspicuous, or the more abstractly spiritual gifts were the most valuable, but rather the gifts of service and counsel, and that the greatest gift was that of love.¹ Even in writing to the Galatian churches, when St Paul was stirred to the very depths of his nature by the necessity of counteracting the legal spirit which threatened to take possession of them, St Paul warns his converts against the misinterpretation and perversion of the conception of liberty, “For ye, brethren, were called for freedom; only use not your freedom for an occasion to the flesh, but through love be servants one to another.”² There can, we think, be little doubt that the early Church was troubled with anarchical tendencies, very similar to those of some of the Anabaptist movements of the sixteenth century, and that these sprang from the same source. The reaction against the legal spirit carried men off their feet, and St Paul has to take the greatest pains to counteract the possible effects of his own teaching, just as Luther had to do when he wrote his treatise on ‘The Liberty of the Christian Man.’

There is indeed no direct evidence in the New Testament, nor, as far as we have seen, in the early Fathers, of an explicit repudiation of the principle of civil government in the early Church, though such a charge may have been brought against the Church; but it is at least very easy to conjecture that the enthusiastic spirit of the freedom of the sons of God, of the members of the true kingdom of Christ, might easily pass into a contempt for all government, especially when that government was in the hands of unspiritual persons. In a later volume we shall have to consider the significance of Wycliffe’s doctrine of civil lordship: it is possible that his view may have been anticipated in primitive times. There are even not wanting some germs out of which such sentiments might grow, both in the Gospels and in St Paul’s own writings. Our Lord had very sharply contrasted the

spirit of the Gentiles with the spirit of His kingdom, when he said : “ Ye know that they which are accounted to rule over the Gentiles lord it over them; and their great ones exercise authority over them. But it is not so among you: but whosoever would become great among you, shall be your minister: and whosoever would be first among you, shall be servant of all.”¹ It is not difficult to understand how such a conception might lead men of a rash and impulsive disposition into a contempt for all secular authority. In St Paul’s first letter to the Corinthians we have a reference to the relation of Christians to the law-courts, which might quite possibly be understood as indicating a certain tendency to slight the ordinary machinery of the secular power. “ Dare any of you, having a matter against his neighbour, go to law before the unrighteous, and not before the saints ? Or know ye not that the saints shall judge the world ? and if the world is judged by you, are ye unworthy to judge the smallest matters ? ”² No doubt St Paul’s words are aimed at the contentious unbrotherly spirit which prevailed in the Church, but there is, probably unintentionally and unconsciously, a slightly depreciatory accent in the reference to the secular courts, perhaps a slight confusion with regard to the nature of civil justice.

It seems most probable, then, that St Paul’s vindication of the authority of the civil ruler, with the parallel expressions of St Peter’s epistle, were intended to counteract some anarchical tendencies in the early Christian societies, were intended to preserve the Christian societies from falling into an error which would have destroyed the unity of human life, and would have tended to put them into a ruinous opposition to the general principles of human progress. We shall have occasion to see how this question is developed in the writings of the Fathers, and we shall then recognise both how important it was that St Paul had so clearly laid down the true principles of the religious conception of the state, and also how even the clearness of his treatment failed to save later Christian thinkers from a perversion of this conception.

When we now consider the relation of this theory of the nature of government to the contemporary philosophical conception of the state, we find that it is both old and new. It is essentially the same theory as that of the Stoics, that man is by nature a social creature, that government is an institution necessary to the proper development of human life. St Paul is translating the philosophical conception into the Christian conception of the divine order, and the translation has its real importance, but fundamentally the conception is the same. It is new in expression but the same in substance, and even the expression is, as we have already seen, to be found in such contemporary writers as Seneca and Pliny.¹ We shall have presently to consider the theories that grew up on this translation, but we shall see throughout our work that the translation was necessary if Christian civilisation was to inherit the philosophical tradition of Aristotle and the Stoics. We must remember that clearly enough the Epicurean tradition was not the same as the Stoic, that the attitude of the philosophers of that school towards the organised State was at least one of indifference, and, as we have just seen, there were elements in the Christian conceptions which might have tended towards a similar position. It is therefore a matter of the greatest importance that St Paul should have recognised the gravity of the question, and should have set forth his views with such distinctness and penetration.

We have still to consider the theory of property in the New Testament. A great deal has been said about what has been called the communism of the early Church, and it has

been thought that we see the beginnings of this in the condition of the Church of Jerusalem as described in the first chapters of the Acts. We must begin by examining the exact nature of the accounts of this which are given to us. The first reference is at the end of the second chapter : “ And all that believed were together, and had all things common ; and they sold their possessions and goods, and parted them to all, according as any man had need.” ² The next reference is in the fourth chapter: “ And the multitude of them that believed were of one heart and soul: and not one of them said that aught of the things which he possessed was his own ■ but they had all things common. . . . For neither was there among them any that lacked: for as many as were possessors of lands or houses sold them, and brought the prices of the things that were sold, and laid them at the apostles’ feet: and distribution was made unto each, according as any one had need.” ¹

There is no doubt that if these words stood alone we should conclude that a complete communistic system was established in the Church of Jerusalem, and we might almost conclude that conformity to this was one of the regular tests of membership. But we must look at the general narrative a little more carefully, and our first impression will then be a good deal modified. One of the most dramatic incidents in the story of the primitive Church is the narrative of the falsehood and death of Ananias and Sapphira, and in this narrative we observe phrases which materially affect our judgment of the condition of the Church. “ A certain man named Ananias, with Sapphira his wife, sold a possession, and kept back part of the price, his wife also being privy to it, and brought a certain part, and laid it at the apostles’ feet. But Peter said, Ananias, why hath Satan filled thy heart to lie to the Holy Ghost, and to keep back part of the price of the land ? Whiles it remained, did it not remain thine own ? and after it was sold, was it not in thy power ? How is it that thou hast conceived this thing in thy heart ? thou hast not lied unto men, but unto God.”²

It is at least clear from this narrative that there was no compulsory system of communism in the Church, that submission to it was not a condition of membership of the Christian society in Jerusalem, and we are compelled to reconsider the judgment which we might be inclined to found upon the passages first quoted. It would seem safest to conclude that the first wave of enthusiasm in the Christian society in Jerusalem led to a sudden development of the charitable impulses of the community to such a point that at least for the time the Christian society might well have appeared to be living in a complete community of goods, but that this condition of things was never developed into a complete system, and that

the surrender of individual property was never a condition of church membership.

The narrative of the Acts throws no light upon the continuance of this state of things in Jerusalem. There are many traces in the letters of St Paul of great poverty in the Church of Jerusalem, a poverty probably due mainly to the crowds of Jews, many of them doubtless of very small resources, who from time to time made their way to Jerusalem, from all parts of the Empire, to attend the great festivals; and we find St Paul engaged in collecting money in the churches which he visited, for the relief of this poverty, but there is nothing to show us whether the Church in Jerusalem itself continued to be under the same conditions as at first or not.

It may perhaps be said that there are traces in the Gospels, and especially in the Epistle of St James, of a tendency to look upon the rich as being, by the very fact of their riches, evil, and the poor as being, by reason of their poverty, good. It is certainly noteworthy at least that St James represents the true disciple as being poor, and

oppressed by the rich, and that he proclaims the coming judgment of God upon the rich.¹ And in the Gospels there is more than one trace of a tendency to regard the condition of the rich as being, normally at least, full of danger,² and the condition of the poor as being one of blessedness.⁸ (In St Matthew's gospel this poverty is explained in a spiritual sense.) In one well-known passage our Lord tells the rich young ruler that for him the way of perfection lies in the renunciation of all his wealth.⁴ It is of course true that the interpretation of the passage has been the subject of much dispute: we shall see presently in what very various fashions the Fathers deal with it, but the general impression which we derive from the Gospels is certainly that wealth is at least a difficulty in the spiritual life.

When we consider the condition of the Christian Church outside of Judaea, we find no trace of any such system of the common life as may have existed in some loose fashion in Judaea. St Paul, in his various letters, constantly exhorts his disciples to liberality, especially towards the poor Christians in Jerusalem,¹ but also in more general terms;² but there is little trace of a community of goods in the churches to which he writes, unless we may conjecture that the idle and disorderly life of some of the Christians at Thessalonica may be related to a somewhat indiscriminate system of almsgiving in that community. St Paul's emphatic words, "If any will not work, neither let him eat,"³ may imply that the benevolence of the brethren was encouraging a certain number of Christians in idle and thriftless ways. We have discussed the traces of certain anarchical tendencies in the primitive Christian societies, and it is quite possible that this spirit was fostered by a charity which may sometimes have been almost reckless. But in all this there is no trace of any strict community of goods, any notion that the ownership of property was something illegitimate.

So far as the New Testament is concerned, we can hardly say that there is any theory of property of a strict kind: the Gospels and St James may tend to represent the sense of the dangerous responsibilities and temptations which wealth brings; the Acts and the Epistles show us that the Christian societies, from the outset, felt the imperious claims of the brotherhood, and interpreted them as meaning that it was the duty of a Christian man to see that his brother was not in want.⁴ We shall return to the subject again when we deal with the theory of property as it is presented in the early Fathers.

CHAPTER IX.

NATURAL LAW.

WHEN we consider the character of the political theory of the Christian Fathers we find ourselves in face of a considerable difficulty in arranging our materials. The writings which we have to consider extend over a period of some six centuries, from St Clement of Rome and the 'Teaching of the Twelve Apostles' in the first century to St Isidore of Seville in the beginning of the seventh, and they represent very various standpoints. Some of them are written by men who have nothing of a philosophical habit of thought; while others represent the more or less reasoned reflections of men who might be good or bad philosophers, but who were at any rate thinkers. Some of them, that is, simply seem to show us what notions were current among Christian men, others must be taken also to represent the particular turn given to these by the individual writers. We are compelled to recognise considerable diversities of opinion among these writers, and we have endeavoured to note these when they occur, and to discuss the relations of the different views to each other: at the same time, we think that it is true to say that in the main the

Fathers represent a homogeneous system of thought, and we have therefore usually arranged our materials under the same general system which we have so far followed, not under the names of the individual writers, while we have usually endeavoured to present their opinions in some roughly chronological order.

We have seen the importance of the development of the theory of natural law in the Roman jurists, we have seen how at the close of the second century the law of nations is distinguished from the law of nature, and how this distinction is fixed with more or less complete definiteness in the sixth century. We must now consider the treatment of this subject in the Christian writers of these centuries. We have observed the general characteristics of the theory of Cicero with respect to the natural law, that there is a law behind all the positive ordinances of human society, a law which is written in the hearts of all men, drawing them to good, forbidding them to do evil, a law which is itself the expression of the reason and nature of God Himself, and that from this all the true laws of men are derived. We have also seen that at least in one great passage St Paul indicates that he also conceives of such a principle as existing in the heart of every man—that every man does in his heart know the law of God, which forbids man to sin, and commands him to do what is right. Whether St Paul's conception should be traced to the natural development of Jewish thought, or to the influence of that Hellenic culture which had already strongly affected Judaism, or to the special circumstances of his own education at Tarsus, is, as we have said, difficult to determine. For our purpose, indeed, we may suppose that it was derived from any or all of these sources. It will be obvious to any one who studies the phenomena, that here is one of the many points where the Christian conception and that of the Western world at large coincided. The theory of natural law became one of the commonplaces of Christian thought.

In Origen's treatise against Celsus there is an interesting sentence which may be taken as characteristic of the attitude of the Christian thinkers. Celsus had urged that "Law is king of all things," and Origen, after expressing a necessary qualification of the phrase as liable to misunderstanding, agrees that that which is law in the proper sense of the word is by nature king of all things, even though there may be some who have like robbers abandoned the law and deny its validity. The Christians, he says, have come to the knowledge of this law which is by nature king of all things, for it is the same as the law of God, and they endeavour to live in accordance with it.¹ This frank admission of the truth of the conception and the identification of the law of nature with the law of God—an identification already made, at least in terms, by Cicero—is representative of the common attitude of Christian writers towards this conception.

Even Tertullian, who, if any man, represents the extreme opposition to the ideas of the Greek world, uses language which is the same as that of the philosophers. Nature, he says, is our first school: we know God first by nature. Nature is the teacher, the soul the disciple. Whatever nature taught, it was taught by God.² Lactantius, with his usual somewhat captious way of dealing with ancient philosophy, when discussing Zeno's principle of living according to nature, complains at first that this is too vague: there are many varieties of nature, he says, and the phrase might mean that men are to live like beasts; but finally he admits that, if the principle means that man, who is born to virtue, is to follow his own nature, it is a good principle.³ These Fathers, that is, admit that there

is a law written by nature in men's hearts which is the true rule of human life and conduct.

The view of the later Fathers is the same. The writer known as "Ambrosiaster," in his commentary on St Paul's Epistle to the Romans, gives us an interesting tripartite definition of law, and a statement of the relation of the law of nature to the law of Moses.⁴ The definition is interesting, but more significant is the conception of the relation of the Mosaic Law to the natural law, as being something intended to supplement as well as to confirm it. The same conception is expressed in a letter of St Ambrose: The Mosaic law was given because men had failed to obey the natural law.¹ Again, St Ambrose says, Law is twofold, natural and written. The natural law is in man's heart; the written laws in tables. All men are under the law—that is, under the natural law.² And again : The law of God is in the heart of the just man. Which law ? Not the written but the natural law, for law is not set for the just, but for the unjust man.³ The natural law, says St Jerome, speaks in our heart, telling us to do what is good and to avoid what is evil; and, again, he says that the whole world received the natural law, and the Mosaic law was given because the natural law was neglected or destroyed.⁴

It is interesting to notice that the Fathers frequently, as we have before said, connect their treatment of the natural law with St Paul's phrases in Romans. St Ambrose, for instance, says that it is the Apostle who teaches us that the natural law is in our hearts.⁵ St Augustine also refers to St Paul's words in a passage in which he divides law into three species;⁶ and St Hilary of Poitiers does the same in describing the general scope of the natural law. He defines this as being that a man must not injure his fellow-man, must not take that which belongs to another, must keep himself from fraud and perjury, must not plot against another man's marriage.¹ It is interesting to compare this with the definitions of the natural law by St Ambrose² and by St Augustine.³ It is clear that these are derived from Cicero and other ancient writers.

It is unnecessary to multiply quotations. There seems to be no division of opinion among the Fathers upon the subject. Practically they carry on the same conceptions as those of Cicero and the later philosophers, and while they bring these into connection with the suggestion of St Paul, they cannot be said either to modify these inherited conceptions or to carry them any farther.

The treatment of the law of nature in the Fathers is not complete till we come to St Isidore of Seville at the beginning of the seventh century. Then we find that distinction which we have considered in Ulpian, Tryphoninus, and Florentinus, and in the Institutes of Justinian, restated with great directness, and defined in a method which is interesting and to some extent novel. The importance of the treatment of the natural law by St Isidore is, however, not only due to the fact that he furnishes us with interesting evidence as to the general prevalence of the theory of law in this form, and shows us that it was adopted by an important Christian writer. His importance in the history of the theory of natural law is much greater than this. His definitions were finally embodied, in the twelfth century, in Gratian's Decretum, and so passed into the structure of the Canon Law, and furnished the form of all the mediaeval ecclesiastical treatment of the subject; and though, no doubt, with the reviving study of the Roman jurisprudence, the same conceptions would probably have appeared, yet the fact that they were already embodied in St Isidore's Etymologies secured the unanimity of mediaeval theory upon the subject.

The position of St Isidore in the development, especially of the political theory of the Middle Ages, is indeed out of all proportion to the intrinsic merits or pretensions of his work. His 'Origins,' or 'Etymologies,' is really the seventh-century equivalent of a modern encyclopaedia. He suggests the derivation of each word with which he deals, and gives a brief account of the thing which it describes. It would be extremely interesting, were it not here out of place, to trace the history and origin of such an encyclopaedic work as that of St Isidore. It is evident enough that in most points and in general conception it is not original. It seems to belong to the same class of work as Martianus Capella's 'De Nuptiis Philologiae.' How much farther back this encyclopaedic form of literature can be traced we are not competent to say. It will be seen in the course of our inquiries that St Isidore furnishes the model of a variety of works of the same kind in the Middle Ages, of which the nearest is Hrabanus Maurus's 'De Universo,' which belongs to the ninth century.

St Isidore's work has therefore little of the character of an original production, and indeed makes no claim to this. For our purpose, indeed, this fact rather increases than diminishes its importance. We feel convinced in reading St Isidore's definitions that he is giving us not merely his own judgments but the generally current conceptions of his time. It may of course be urged that St Isidore, writing as he did in Spain, was rather far removed from the centre of the culture of his time, and that we must be prepared to admit the influence of the new barbarian circumstances upon his mode of thought. With regard to some aspects of his political ideas this may be quite true, and indeed may be a fact of some importance. But with regard to the subject which we are at present considering, his treatment of the theory of Natural Law, there seems no reason to think that any such special influences are at work upon him. We should indeed be glad, if it were possible, to trace more clearly the sources of his theories, for much remains, to us at least, very obscure; but we see no reason at all why we should look for these outside of the limits of the Latin culture.

St Isidore of Seville deals with the definition of law in the following terms:¹ "*Jus autem naturale est aut civile aut gentium.*" That is, he begins by laying down the tripartite character of law as Ulpian and the Institutes do. He then defines natural law, "*Jus naturale est commune omnium nationum, et quod ubique instinctu naturae, non constitutione aliqua habetur; ut viri et feminae conjunctio, liberorum successio et educatio, communis omnium possessio, et omnium una libertas, adquisitio eorum quae ccelo, terra, marique capiuntur. Item depositae rei vel commendatae pecuniae restitutio, violentiae per vim repulsio. Nam hoc, aut si quid huic simile est, numquam injustum, sed naturale, aequumque habetur.*"

It will be evident that the definition is related to that of Ulpian and the Institutes,² and yet that there are considerable differences between them, and these of some significance. The statement that the *jus naturals* is common to all animals has disappeared, and in its place we read that it is common to all nations, and that men follow it "*instinctu naturae non constitutione aliqua.*" We have already had occasion to deal with this change, but we must again point out that it seems to represent the fact that while Ulpian's definition suggests that the *jus naturals* was something of the nature of the animal instinct, the general tendency of thought was to look upon it as a body of principles rationally apprehended. It is true that St Isidore says that men follow it "*instinctu naturae,*" but this is con

trasted, not with reason, but with “*constitutio aliqua*,” and it should be observed that under the definition is included an ethical habit, such as the “*depositae rei vel commendatse pecuniae restitutio*.” This has no place in Ulpian’s definition. St Isidore defines the *jus gentium* in the following terms: “*Jus gentium est sedium occupatio, aedificatio, munitio, bella, captivitates, servitutes, postliminia, foedera pacis, indutiae, legatorum non violandorum religio, conubia inter alienigenas prohibita. Et inde jus gentium, quia eo jure omnes fere geutes utuntur.*”¹ We have already compared this definition with a fragment of Hermogenianus contained in the Digest, and with one part of the discussion of this question in the Institutes of Justinian.² It is difficult to say whether St Isidore’s definition is directly related to these, but there seems to be a general agreement of character between them all. In passing we may point out that there is the same contrast between the natural liberty of all, under the *jus naturale*, and the slavery which belongs to the *jus gentium*, in St Isidore and in the Institutes ; but we shall have to return to this point later. The *jus civile* is defined by St Isidore as follows: “*Jus civile est, quod quisque populus, vel civitas sibi proprium, humana divinaque causa constituit.*”³ This is practically the same as the definition of the civil law as distinguished from the *jus gentium* and the *jus naturale* in the Institutes of Gaius and Justinian.⁴

St Isidore of Seville has obviously reproduced with certain changes of detail the theory of the tripartite character of law which we have already seen in the works of Ulpian and in the

Institutes of Justinian. With his work the conception passes into the common stock of mediaeval tradition on political theory. The distinction would, however, have had little or no meaning if it had not been closely connected with that theory of the natural condition, or state of nature, the state antecedent to the conventional institutions of society, which we have already studied in Seneca, and whose influence we have recognised in the lawyers. We must examine this theory as it is exhibited to us in the Fathers, but we shall find it best to approach the subject by considering their theory of human nature and human institutions. We shall find that there is continually implied in this a reference to a condition of life precedent to and other than that which now exists. We shall see that the conception of the state of nature is in the Fathers identified with the conception of the condition of mankind in the unfallen state.

CHAPTER X.

NATURAL EQUALITY AND SLAVERY.

WE have seen that in the New Testament writings we find a conception of human nature which is very clear and distinct as to the essential and inherent equality of mankind; we find that in the teaching of our Lord Himself men are regarded as all equally the children of God, and that in St Paul’s writings we have the more technical expression of this conception as signifying the capacity of all men for the spiritual and moral life. Whether a man is slave or free he is still capable of the same moral and spiritual life, capable of knowing God and serving Him. If he is a slave he must be treated fairly and reasonably by his master, who is no dearer to God than is the slave.

This conception is carried on with eloquence and force in the writings of the early Fathers—is indeed implied in all that they say. We may refer to one or two passages which deal with the matter directly: the first is in the little work known as the ‘Octavius,’ written by Minucius Felix. He says that all men, without difference of age, sex, or rank, are begotten with a capacity and power of reason and feeling, and obtain wisdom, not by

fortune, but by nature.¹ It is interesting to observe how close these phrases, in spite of certain differences, are to those of Cicero and Seneca; indeed it might be difficult to say whether the author derives his method of expression from the New Testament or from the philosophers. Another passage is contained in Lactantius's work, the 'Divine Institutes.' He is discussing the nature of justice, and after having given the first place in the conception of this to pietas he goes on to urge

that the second part of justice is cequitas—that is, the temper which teaches a man to put himself on an equality with his fellow-men, the quality which Lactantius says Cicero had called cequabilitas. God, who brings forth and inspires men, wished them all to be equal. He made them all for virtue, promised them all immortality. No one, in God's sight, is a slave or a master; He is the Father of all men, we are all therefore His children.

Lactantius finds fault with Roman and Greek institutions as not recognising these principles of equality sufficiently, but it does not appear that he is really attacking the institutions so much as what he considers the wrong temper with which men regard these institutions; for when he considers the objection which some one might make, that the same differences of rank and condition exist also among Christian people, he replies not by denying that the differences exist, nor by condemning their existence, but by urging that Christian people do really recognise each other as brothers and equals, that they estimate all things by their spiritual and not by their material value.¹

Lactantius's phrases are well-meaning and no doubt sincere, but they scarcely justify his attempt to censure the Greek and Roman spirit, and his somewhat inexcusable forgetfulness of the fact that writers like Cicero and Seneca had taken up much the same position towards the inequalities of human condition as his own. Lactantius does not really condemn the existence of the great inequalities of society, only he wishes them to be corrected by the sense of the fundamental equality of human nature, just as Seneca had done.

In the later Fathers this conception of the intrinsic and primitive equality of human nature is discussed with much fulness, but almost always in direct connection with the treatment of the institution of slavery: they assert that this equality is primitive, and also that in some sense it always continues, while they also develop with great clearness a theory which is to account for the existence of this unprimitive and, in one sense, unnatural institution of slavery.

We do not know that any passage in the writings of the Fathers represents the general character of their theory better than a discussion of the subject by "Ambrosiaster," in his commentary on St Paul's Epistle to the Colossians. He begins by warning masters lest they be puffed up with pride and forget that God made, not slaves and free men, but all men free. Slavery is the consequence of man's sin; man, making war upon his fellow-man, makes captives, and chance determines whether these are to remain slaves or to be redeemed. Before God the sinner is the slave; Ham is an example of this, and the ancient writers who maintain that the wise were free and the foolish slaves, really recognised this principle. Masters must remember that their lordship extends only over the body; they have no authority over the soul, God only is the master of that: let them remember this, and only exact just service from their slaves, who are still their equals, not to say their brethren.¹

It will be noticed that there are really four distinct propositions with regard to human nature and slavery contained in this passage. First, that men as God made them were

free; second, that this still continues in some sense, the condition of slavery is very largely one determined by fortune, and this condition does not extend beyond the body; thirdly, that slavery is the result of man's sin and sinfulness, the true slavery is that of the soul, for the foolish are the true slaves;

fourthly, that masters must treat their slaves with consideration and forbearance. All these points can be amply illustrated from the works of the Fathers.

All the Fathers maintain that in their original nature men were free and equal. Salvian speaks of that human nature and condition which makes masters and slaves equal.¹ St Augustine, in a very notable passage, to which we shall have to return, lays it down that God did not make rational man to lord it over his rational fellows, but only to be master of the irrational creatures, and that no one in that nature in which God first made man is the slave either of man or of sin. In the original order of things men would have been free and equal.² Gregory the Great insists upon the same conception. Masters are admonished that they should remember that their slaves are of the same nature as themselves, lest they should cease to recognise that those whom they hold in bondage are equal with them, through their share in one common nature.³ In a passage in his work on Job, a passage which is frequently referred to in mediaeval literature, and some of whose phrases have become almost classical, Gregory admonishes great men to remember that by nature we are all equal, that nature brought forth all men equal, that it is only by a secret dispensation of God that some men are set over or are inferior to others.⁴ St Gregory's phrase, "*Omnes namque natura eequales sumus*," is strictly parallel to Ulpian's "*Quod ad jus naturale attinet, omnes homines sequales sunt*." We have just seen how St Isidore of Seville says that under the natural law there is "*omnium una libertas*."⁵

But, further, this equality is not a thing wholly of the past: the inequalities of condition and life only affect the body, they have no relation to the mind and soul. The slave, St Ambrose says, may be the superior, in character, of his master; no condition of life is incapable of virtue, the flesh can be enslaved, the mind is free. The slave may really be more free than the master. It is sin which renders a man truly a slave, innocence is free. He is free under any outward form of slavery who is not governed by the love of the world, by avarice, by fear. The free man is he who can look out with confidence on his actual life and for whom the future has no terrors.¹ St Ambrose's words remind us very forcibly of those of Seneca, and indeed so far the theories we are considering do not seem essentially to differ from those with which we have already dealt. But they are reinforced by the emphatic assertion that in Christ we are all one. St Ambrose in another treatise puts this very forcibly. Neither family nor rank affect the true position of men. Slaves or freemen, we are all one in Christ; slavery can take nothing from man's character, nor can freedom add anything to it.² This is expressed in another and perhaps more technical fashion by the author of one of the sermons attributed to St Augustine, who protests against the harsh treatment of Christian slaves by Christian masters, and upbraids them for not considering that the slave is their brother by grace, has equally with them put on Christ, partakes of the same sacraments, has the same Father, God, and should find in his master a brother.¹ These Christian conceptions do not perhaps add anything in strict theory to the philosophic conception of the equality of man's nature, but they represent to us a mode of apprehending this which has probably

had a very great and continuous influence on the development of the practical consequences of this theory of human nature.

Man, then, as God made him was free and equal. The subjection of man to man is something which belongs not to his original nature but to his present condition; and more than that, this equality and freedom is in one sense indestructible and inalienable: even now, though his body may be in subjection, his mind and soul are free, he is still capable of reason and virtue, he may even now be superior to the man to whom he is enslaved, and in his relation to God all differences of condition are meaningless. Men, whether slaves or freemen, are called to one common life in Christ and God, called to know God as the common Father and to hold each other as brethren. We may stay for a moment to notice once again how far we have travelled from the Aristotelian mode of thought, how clearly we are in presence of what we may call the modern conception, the fundamental idea upon which the modern democratic theory of society depends. The Christian Fathers are clearly restating in their own fashion the same conceptions as those which we already met with in Cicero, in Seneca, and in the lawyers.

But slavery is not, in the judgment of the Christian Fathers, unlawful or improper: they recognise its existence, they acquiesce in its presence, and they furnish a complete theory of its origin and a new justification of its continuance. Slavery, they say, had no place in the primitive condition of life; man, as God created him, was not made to be either the slave or the lord of his fellow-man; but, they add, man has long ago passed out of that primitive condition, and lives now under other circumstances. He was once innocent and harmless, now he is vicious and inclined to attack and injure his fellow-man. Under the primitive conditions, he needed no coercive discipline to train him to goodness and to restrain his evil desires; he lived in freedom, and under conditions of equality, for he had no tendency to abuse his freedom to the injury of his neighbours, and therefore he did not need to be under the domination of his fellow-man, lest he should do wrong.

The Fathers conceive of the state of man before the Fall much as Seneca conceives of the Golden Age,¹ and they account for the disappearance of the primitive conditions of that age by the theory of the Fall. By the Fall man passed out of the state of nature into the state in which the conventional institutions of society are necessary. Slavery did not exist in the state of nature when men were free, and in some very large sense equal. But the Fall brought with it the need of new conditions, of a new discipline, by which the new and evil tendencies of human nature should be corrected. Slavery is a consequence of the coming of sin into the world, and is also a disciplinary system by which the sinful tendencies of man may be corrected.

We have already seen how this conception is stated by "Ambrosiaster." In general terms he puts the universal theory of the Fathers, that slavery came into the world with sin. This conception is drawn out with greater completeness by St Augustine, St Ambrose, and St Isidore of Seville. The passage to which we have already referred in the 'De Civitate Dei,' as illustrating the conception of the equality and primitive liberty of mankind, also contains one of the best statements of the patristic theory of the origin and rationale of slavery.²

Man, who was made in the image of God, and endowed with reason, was made to be the lord of all irrational creatures, but not of his fellow-men. Slavery has been imposed by the just sentence of God upon the sinner: it is a consequence not of man's nature but of man's

sinfulness; by nature man is the slave neither of sin nor of his fellow-man. Slavery is intended to preserve the true order of life, which is threatened with destruction by sin. St Augustine looks upon slavery partly as a punishment of sin, but also as a remedy for sin, as one of those institutions, unnatural in one sense, as being contrary to the primitive conditions of human nature, but necessary under the actual circumstances of society. St Ambrose urges more than once that sin and vice and ignorance do in themselves make a man a slave. Sin is always servile, innocence alone is free. "Every one who commits sin is a slave of sin."¹ It is really better for a vicious man to be a slave; a man who cannot rule himself is better under the authority of a wise man. When Isaac put Esau into subjection to Jacob, he was really conferring upon him a benefit.² The same conception is drawn out with precision and clearness by St Isidore of Seville. Slavery is a punishment for sin, but a remedial punishment; it is intended to correct the evil tendencies of original sin in human nature. It is necessary that the evil dispositions of some men should be restrained by terror, and yet God is equally careful for men whether they are slaves or free, and it may chance that a good man may be enslaved to an evil master while he is really his superior.¹ St Isidore seems to mean that slavery is one of those disciplinary institutions which are necessary under the actual conditions of human nature, which do, in the general, tend to correct the result of men's depravity, though he is evidently compelled to recognise that the dispensation of Providence is not always adjusted correctly to the individual case.

This theory of the Fathers deserves careful attention. We have seen that they use phrases which illustrate the sincere conviction with which they, like the later philosophers and the lawyers, maintained the natural equality and liberty of mankind. Clearly they all continue to hold firmly to the view that human nature is fundamentally equal, that there is no reality in such a distinction as that which Aristotle had made between the naturally free man and the man who was naturally a slave. Men are all possessed of reason and capable of virtue; they are all the children of God. But it is also quite clear that the Christian writers were no more prepared to condemn the actual institution of slavery as unlawful than were the jurists or the philosophers. In the writings of the jurists we have the apparent contradiction stated, without explanation, that slavery is contrary to nature and yet that it exists. Seneca, at least, among the philosophers, suggests an explanation of the apparent contradiction. Institutions which were not necessary in the age of innocence became necessary as men's vices increased. The Fathers, bringing to their consideration of society a dogmatic theory of the Fall, are able to apply the same considerations as those which Seneca urges, with completeness and coherence. Had Adam not sinned and brought sin into human nature such an institution as slavery would have been unnecessary; but the Fall, in bringing corruption into the world, made necessary institutions which should correct and control the sinfulness of human nature.

Here we have the explanation of what at first sight seems a paradoxical contradiction between the principles of the natural law and the actual conditions of human life. The later Roman jurists had looked upon the natural law as divine and unchangeable,¹ and, almost in the same breath, had spoken of slavery as an institution actually existing and yet contrary to the natural law. Directly at least they suggest no explanation of the apparent contradiction. Seneca had suggested, and the Fathers developed completely, an explanation which was in its own way profound and philosophical. The law of nature in

its completeness is only adapted to the state of nature. In the condition of innocence and simplicity men needed no coercion to make them obey the principles of this law. But once this innocence had disappeared man needed discipline and coercion to make him obey even the more general principles of justice and right, and hence much which is contrary to nature in the primitive condition is necessary in the actual condition of human life.

Slavery is then, in the view of the Fathers, a lawful institution, and they constantly urge upon the slave the duty of obedience and submission. St Ambrose, after admonishing masters to remember that they are of the same nature as their slaves, bids the slaves serve their masters with good will; a man must patiently accept the condition in which he is born,

and must obey harsh as well as good masters.¹ St Augustine, in one interesting passage which is also of some importance in connection with the theory of government, argues that Christ makes good slaves of bad ones; that, when they turn to Him, He teaches them, not that it is improper that the righteous should serve the wicked, but rather that slaves should follow His example in rendering service.² In another place, with still greater emphasis, he repudiates the notion that the precedent of the liberation of the Hebrew slaves in every seventh year might be applied to the case of the Christian slave: the apostle, he says, had admonished slaves to obey their masters, lest Christian slaves should demand such a manumission.³ The author of one of the sermons attributed to St Augustine puts the matter very forcibly when he bids the slaves love and obey their masters from the heart, because it is God who has made these to be masters and the others to be their servants.⁴ But perhaps the most emphatic assertion of the propriety of slavery is to be found in one of the canons of the Council of Gangrse, held in the year 362. In the third canon the anathema of the Church is laid upon any one who under the pretence of godliness should teach a slave to despise his master, or to withdraw himself from his service.⁵

The Church, then, so far from repudiating the institution of slavery, accepted the fact, and framed its own canonical regulations in accordance with it. The history of the canonical

and secular legislation with regard to the slave who entered a monastery, or procured ordination, is long and intricate, and it is not necessary here to deal with it in detail; still some points in this should be observed. At an early date it had become the Church rule that a slave could not be ordained unless he were first set at liberty. St Leo expressly prohibits this,¹ and a little later the matter is treated with considerable detail by Pope Gelasius I. In one of his letters he orders a certain bishop to restore a slave, who had been made a "clericus," to his mistress; but with regard to another slave who had been ordained to the priesthood he orders that he should be sent back to his mistress, not as a slave but as a priest at the church on her estates.² In another letter he forbids the reception of any slave into a monastery without the permission of his master? This does not, however, represent the universal character of Christian legislation on the subject. In Justinian's fifth Novel the question of the entrance of slaves into monasteries is handled in a somewhat different spirit. Justinian prefaces his judgment on the subject by the recognition of the fact that the divine grace makes no distinction with regard to human conditions; that in the worship of God all distinctions of male or female, slave or free, disappear; and he goes on to lay it down that every one, whether free or a slave, must undergo a probation of three years before being accepted as a monk. If within that time a

master come to reclaim his slave, and can prove that the slave had stolen something, or had committed a crime of some kind, and had therefore fled to the monastery, the slave is to be restored to him, on the promise that he will not injure him. But if he cannot prove the charge, the slave is not to be surrendered to him, even if the master's demand is made within the three years: after that, no demand can be made even on the ground of any crime committed by the slave before his coming to the monastery. Only, if the slave leave the monastery to return to the secular life, then the master can reclaim him.¹ We shall have to recur to this question of the position of the slave or serf with respect to ordination or entering a monastery in later chapters. We here refer to the matter only as illustrating the fact that the Christian Church acquiesced in the institution of slavery, and even formed its own internal regulations in accordance with the fact.

Slavery, then, in the judgment of the Fathers, is a legitimate and useful institution. But the Fathers are very careful to urge upon the masters that they must show their slaves consideration and kindness, and even that they are responsible for the spiritual welfare of their slaves. St Augustine urges upon the masters of slaves that while with respect to temporal matters they may well distinguish between their children and their slaves, with regard to the worship of God they should take equal thought for both: the true *Pater familias* will try to bring up his whole household in the service of God.² St Gregory the Great, in a letter addressed to the nobles and proprietors of Sardinia, warns them that they will have to give account to God for all those who are in subjection to them; it is true that these are to serve the temporal interests of their lords, but the lords are responsible for their eternal wellbeing.³

We must not be understood to be discussing the question of the complete influence of Christianity on ancient slavery: our work here is concerned with the theory of the subject. So far as we should venture an opinion on this matter, we should say that Christianity was one of the many influences which were gradually tending to bring the slavery of the ancient world to an end. It would appear evident that the influence of Christianity tended to promote the mitigation of the hardships of slavery, not only by its exhortations to the master to remember that the slave was his brother, but also by promoting legislation for the protection of the slave and by actually encouraging manumission. The laws of the Christian Emperors carry on from the older legislation, and seem to develop further, regulations for the protection of slave women and children from prostitution¹ and exposure,² and it is very noticeable that one of the earliest laws enacted by Constantine after his conversion was that by which it was permitted to perform the ceremony of manumission in the Christian Churches.³ The theory of the Church may have looked upon slavery as legitimate, but it is clear enough that the practical influence of the Church was in favour of manumission. In later centuries we find references to the manumission of slaves which imply that this was considered to be a pious work, likely to profit the souls of the persons who perform it.⁴ We do not doubt that the general influence of the Church tended towards the mitigation of the hardships of slavery, and even towards the disappearance of the institution. But the more clearly we may recognise this the more necessary is it to recognise also that the theory of the Church is somewhat different: we think that it must be admitted that the influence of the theory may have had considerable effect both in defending the actually existing slavery of the ancient

world, and in assisting in its revival in the fifteenth century when Europeans came into contact with the negro races.

CHAPTER XI.

NATURAL EQUALITY AND GOVERNMENT.

IN dealing with the question of slavery we have anticipated a good deal of what we have to say about the relation of the theory of natural equality to the theory of organised society and government. That natural equality which is, in the judgment of the Fathers, contrary to slavery, is also contrary to the subjection of man to man in government.

The Fathers maintain that man is made for society, that he is by nature sociable and inclined to love his fellow-men. Lactantius, in commenting on a passage from Cicero's *De Republica*, which we have already discussed, denies that they were ever apart.¹ It is indeed possible that Lactantius is a little confused in his judgment of human nature. In another place he seems to mean that man does indeed desire society, but it is on account of the weakness of his body, which makes him incapable of defending himself in solitude.² Still, even so, he maintains that men are by nature driven to the social life. A clearer conception is very forcibly stated by St Augustine in several passages. Human nature is, he says, sociable, and men are held together by the bond of kinship.³ He approves of the conception that the life of the wise man is a social life.⁴ Man, he says, is driven by the very laws of his nature to enter into society and to make peace with men.¹ It is of some importance to observe this judgment, for, as we have already said, it must be remembered that ancient philosophy had spoken with a twofold voice on the matter. The Epicurean had plainly tended to think of political life as at the most a necessity, perhaps an unfortunate necessity, arising from the infirmities of human nature, while the conception of the obligation of political life even for the wise man had been carried on by the Stoics, although, as we have already seen, it requires a little care to recognise how emphatically they held this. Lactantius may perhaps waver between two opinions, perhaps scarcely recognising the significance of the question; but St Augustine, at least, is clear in his judgment, and he is, as far as we see, the representative of the normal type of thought of Christian writers.

Man is by nature made for society. But it is not by nature that man is the lord of man, it is not by nature that man is in subjection to man. We must recur again to that most important treatment of the question by St Augustine, to which we have already referred in dealing with slavery. God made rational beings in His own image, not to be lords over each other, but to be lords of the irrational creatures; the primitive good men were rather shepherds of their flocks than kings of men.² The government of man by man is not part of the natural order of the world. In another place St Augustine speaks in the severest terms of the desire of domination, and treats it as arising from an intolerable pride which forgets that men are each other's equals.³ Gregory the Great represents precisely the same attitude towards the primitive order of human life. In the passage already quoted in relation to slavery, he points out the immense profit that great men will derive from the consideration of the equality of human nature, the great benefit they will gain if they will recollect that in the beginning man was set over the other animals, not over his fellow-man.¹ It is probable that Gregory the Great is here following St Augustine, but the general source of the theory can hardly be mistaken : it is that same Stoic theory of a primitive state in which the conventional institutions of society did not yet exist, of which we have already spoken so often. The primitive state of man was to these Fathers, as it

had been to the Stoics like Posidonius and Seneca, a state without any coercive government: in the state of nature men did not need this.

It must be noticed that, at least in St Gregory the Great, this does not mean that in the state of innocence there was no order of society or distinction of authority. In a letter addressed to the bishops of the kingdom of Childebert, in ratifying the authority of Virgilius, the Bishop of Arles, as representing the Roman See, St Gregory urges that some system of authority is necessary in every society—that even the angels, although they are free from sin, are yet ordered in a hierarchy of greater and less.² St Gregory's conception is very similar

to that of Seneca and Posidonius, who, while they think that there was no organised coercive government in the primitive age, think that in that time men freely obeyed the wise.

To return, it seems clear that both St Augustine and St Gregory look upon the institution of coercive government as not belonging to the primitive state of man ; they do not think that government of this kind is a natural institution ; but this does not mean that the Fathers look upon the ordered government of society among men as they actually are, as a thing improper or illegitimate. We have already, in considering their attitude to the institution of slavery, recognised that they conceive of the conditions proper to human life as having been completely altered by the entrance of sin into the world. Slavery was contrary to the natural law of the primitive condition of human innocence, but is proper and even useful under the actual conditions of human nature. It is the same with the institution of government. Coercive government has been made necessary through sin, and is a divinely appointed remedy for sin.

It is interesting to find this conception developed by the Christian writers from a very early date. We have already considered St Paul's treatment of the institution of government and the sanctity which belongs to it. He affirms its sanctity and explains this as arising from the fact that its purpose is to repress the evil and to reward the good. St Clement of Piome, in the great liturgical prayer which forms a concluding part of his letter, does not go beyond St Paul's conception of the sanctity of government: he prays to God for the rulers of mankind, as those to whom God has given authority and glory, that God will give them wisdom.¹

Towards the end of the second century we have in the writings of St Irenaeus a detailed discussion of the origin of government, of the circumstances which have made it necessary, and of the purpose which it is intended to serve. The passage occurs with that apparent irrelevance which is so characteristic of the writings of the Fathers, in a discussion of the mendacity of the devil. Irenaeus begins by asserting that the devil was, as always, a liar, when in the temptation he said to our Lord that all the kingdoms of the earth were his, to give to whom he would. It is not the devil at all, Irenaeus says, who has appointed the kingdoms of the world, but God, and he establishes this by a reference to the passage in the Proverbs, " By me kings reign and princes administer justice," and the saying of St Paul, already discussed (Rom. xiii. 1, &c.) Authority came from God, not from the devil. So far we have nothing new; but Irenaeus then proceeds to discuss the causes which made government necessary, and urges that this is due to the fact that men departed from God and hated their fellow-men, and fell into confusion and disorder of every kind, and so God set men over each other, imposing the fear of man upon men, and subjecting men to the authority of men, that by this

means they might be compelled to some measure of righteousness and just dealing.¹ We have here an explicit statement that the institution of government has been made necessary by sin and is a divinely appointed remedy for sin.

The Christian writers of the same period as Irenaeus do not indeed draw out the relation of government to the existence of evil, as Irenaeus has done, but they agree with him in asserting its divine origin. Justin Martyr lays great stress upon the fact that Christians had been taught by Christ Himself to pay taxes to the ruler, to “render to Caesar the things which are Caesar’s,” and urges that, while Christians can only worship God, in all other ways they gladly serve their rulers.² Theophilus of Antioch, another writer of the second century, while also refusing to worship the king, says that he should be honoured and obeyed, for at least in some sense it may be said of him that he has received his authority from God.³ No doubt these emphatic assertions of the divine authority of the ruler, while they may have been partly intended to allay any suspicions of disloyalty, were also intended to counteract those tendencies to anarchy in the Christian societies, to whose existence the New Testament bears witness. The Christian writers of the second century, then, clearly carry on the tradition of the New Testament that the principle of authority is a divine principle, while in the case of Irenaeus at least we see that this means that government is a divinely instituted remedy for the sin and wickedness of men.

The great writers of the fourth, fifth, and sixth centuries carry on precisely the same conceptions. Most of them indeed only deal with the divine character of government, but St Ambrose, St Augustine, St Gregory the Great, and St Isidore develop the conception of St Irenaeus that government is the necessary divine remedy for sin. St Ambrose speaks of the authority of rulers as being imposed upon foolish peoples, to compel men even though unwillingly to obey the wise.¹ St Augustine, as we have already seen, looks upon the government of men by men as being contrary to the primitive condition of human nature, but as being a necessary and divinely appointed consequence of and remedy for sin.² We give below another passage from his writings in which his conception of government is very clearly drawn out.³

St Gregory the Great echoes the sentiments of St Augustine: we need only refer the reader to the passage which we have already quoted in part, but we may draw attention to some phrases in this which were not specially germane to the subject which we were then dealing with. Men, he says, are indeed by nature equal, but they are different in condition as a consequence of sin: as all men do not live equally well, one man must be ruled by another; there is a bestial tendency in the human race which can only be kept down by fear.¹

St Isidore of Seville, in the same passage in which he deals with slavery as a consequence of and a remedy for sin, also deals with government in the same fashion. The just God, he says, has so ordered life, in making some men slaves and some men lords, that the tendency to evil may be restrained by the fear of punishment; and to the same end princes and kings are appointed, that by fear of them and by their laws the people may be restrained from evil and encouraged to good.²

It is unnecessary to multiply quotations from the Fathers to show that they all accept the theory of St Paul, that Government is a divine institution. We shall have to recur to the matter again when we discuss their conception of the character of the authority of Government, the question of its absolute or limited nature, and the propriety or

impropriety of resistance to it. So far we are only concerned to make it clear how it is that we find the Fathers at the same time maintaining that Government is not natural and primitive, and yet that it is a divine institution. We have tried to make it clear that this apparently self-contradictory position is really a perfectly intelligible, and, on its own terms, rational one. For man is not now in the condition in which God made him: once he was innocent and harmless, now his nature is depraved and corrupted, and conditions which would have been wholly contrary to his primitive nature are now necessary and useful.

CHAPTER XII.

THE THEORY OF PROPERTY.

WE must turn to the theory of property in the Christian writers. We have already seen that the New Testament does not seem to contain any definite theory of property: it may contain traces of a theory that the perfect man has little to do with wealth, but the general tendency of the New Testament writers seems to be to assume the existence of the institution, while they enjoin upon Christian men the duty of using their property especially for the benefit of all the members of the Christian societies.

The earliest Fathers carry on these conceptions very much as we find them in the New Testament: on the one hand they do not seem to have any dogmatic theory of the community of Christian men's goods; on the other hand they continue to insist that the Christian man is bound to use his property to relieve the wants of his fellow-man, and especially of his fellow-Christian. The 'Teaching of the Twelve Apostles' and the so-called Epistle of Barnabas reproduce from some common source very emphatic exhortations to liberality in giving, which in one phrase echo the words of the Acts of the Apostles: "Thou shalt not turn away from him that hath need, but shalt share all things with thy brother, and shalt not say that they are thine own: for if ye are sharers in that which is immortal, how much more in those things which are mortal."¹ The phrase, "Thou shalt not say that they are thine own" (OVK cpeis l'8ia eivat), is very near the phrase of the Acts, "No one of them said that ought of the things which he possessed was his own" (ou8e e*<? ri rwv vTrap^ovrwv avrat eXeyev 1810V elvat, aXX' r)V aurois diravra KOLVCL).

The same conception is represented by Justin Martyr in the second century. In his first 'Apology' he contrasts the covetousness and greed of the ordinary man with the liberality of the Christian. He says of the Christians, that they brought what they possessed into a common stock and shared with every one in need.¹ Justin Martyr again suggests the phrase of the Acts. In the third century St Cyprian quotes the narrative of the Acts, and commenting on it says, that such conduct is that of the true sons of God, the imitators of God. God's gifts are given to all mankind, the day enlightens all, the sun shines upon all, the rain falls and the wind blows upon all, to all men comes sleep, the splendour of the stars and the moon are common to all. Man is truly an imitator of God when he follows the equal beneficence of God by imparting to all the brotherhood the good things which he possesses.² Cyprian does not say that the Christian man must share his goods with all the brethren, but clearly he looks on this as the most perfect way. This gradually became the common view of many Christian writers.

But before considering the later Fathers we must observe that other early Christian writers present us with a somewhat different view of the subject. One of the short

treatises of Clement of Alexandria discusses the Gospel story of the rich young ruler,³ and it is both interesting and important to observe that Clement treats our Lord's injunction to the young man to go and sell all that he had and to give to the poor as being a metaphorical saying, and as really referring to the passions of the soul. He maintains that there is no advantage in poverty unless it is incurred for some special object.⁴ Destitution is distracting and harassing, and it is much better to have such a competence as will suffice for oneself and enable a man to help those who are in need.⁶ Riches, therefore, are things which may, if rightly used, be serviceable to the possessor and to others, and are not to be thrown away.¹ Clement's interpretation of our Lord's words is not, so far as we know, a common one, but it is of considerable importance.

The same general conception is very strongly held by Lactantius. He discusses Plato's theory of community of property, and very emphatically repudiates it as impossible and unjust, and urges that justice is not a matter of external condition but of the soul.² It is not property that must be abolished, but pride and insolence. If the rich would lay these aside it would make no difference though one man were rich and another poor.³ In another passage he discusses the poetical conception of the Golden or Saturnian Age. He looks upon this as no poetical fiction, but a condition of things which really existed and out of which men passed by reason of sin and the loss of the true religion. Lactantius, that is, formally accepts that theory of the state of nature which we have already considered; but it is very noticeable that he refuses to accept the poetical conception of a complete community of goods in that age. He maintains that we must take this as a poetical metaphor. He cannot think that even in that age there was no such thing as private property, but only that men were so generous and kindly that no one was in want.⁴

What are we to conclude as to the position of the earlier Fathers with respect to the institution of property? We must first observe that their whole thought is dominated by the sense of the claims of the brotherhood. Whatever may be the further significance of the narrative of the Acts and the phrases of 'Barnabas' and the 'Teaching of the Twelve Apostles,' this at least is clear, that the Christian societies recognised that every member had a claim upon the others for that which was necessary for his maintenance. Behind this, however, there lies a question more difficult to answer, Did the first Christian teachers and societies, or any of them, think that property was in itself unlawful or improper for the true Christian? It should, perhaps, be observed here that the very important phrases of 'Barnabas' and the 'Teaching' are drawn from a common source, to which the name of 'Two Ways' has been given, and that it has been argued that this work was a Jewish manual of moral discipline. The phrases in the Acts have a very similar ring. It may be suggested, then, that the notion that the perfect life was that of a society in which all shared equally with their brethren all that they had, was one which belonged to some form of the later Judaism,¹ and so passed into the Church.

It is just possible that there may have existed within the Church a tendency to think that among Christian men there should be no private property. But what we know of the historical conditions of the early Christian societies compels us also to recognise that this conception was not carried out into practice, so far as we know, in any community, not even in the community at Jerusalem. It would, however, seem as though there may very

early have grown up in the Christian societies a theory that, while it was perfectly lawful for the Christian man to hold property, to give all that one had to the common funds of the society was the more perfect way. This is not, indeed, a view which was universally held. Clement of Alexandria and Lactantius, as we have seen, exhibit no special inclination towards it, but it seems to underlie the phrases of St Cyprian, it was developed by two of the most influential of Western Christian writers, St Jerome ² and St Augustine,³ commenting on our Lord's words to the rich young ruler, and it formed part of that theory of the ascetic life as the more perfect way which dominates so much of Western thought in the Middle Ages.

When we turn to the later Fathers we find that their theory of property is closely connected with the same general philosophical system as that which governs the rest of their political theories. In the first place, it seems quite clear that they recognise that private property is in no way evil if it is rightly used. St Augustine maintains this dogmatically against the Manichaeans. Who does not understand, he says, that it is not blameworthy to have such things (i.e., property of various kinds), but only to love them, to put one's hope in them, to prefer them to, or even to compare them with truth, justice, wisdom, faith, a good conscience, with love to God and our neighbours.¹ The same view could be illustrated from the other Christian writers, as being the normal judgment of the Christian Church.² Whatever doubt may be entertained as to some primitive Christians, there is no doubt about the formal judgment of the developed society. But when we have recognised this fact, we must also observe that this merely means that the Church accepted the institution of property as being in accordance with the actual conditions of life, just as it accepted the institution of slavery or coercive government: it does not mean that the Church considered private property to belong to the natural or primitive condition of human life. It is true that the Fathers deal with this question in the most incidental and partial manner, and that it is therefore difficult to express ourselves very dogmatically about the theory which lies behind their references, but we think that the best interpretation of these is that they thought that in the primitive state all things were common,—that it is not the law of God but that of the State which directly gives this thing to one man and that to another.

This view is more clearly expressed by St Ambrose than by any other writer. We may first consider a very interesting and well-known passage in his treatise 'De Officiis.' St Ambrose roundly says that private property is not by nature; nature only produced a common right, use and habit produced private right; nature gave all things to all men.³ We must

not understand this as meaning that property is unlawful, but only that it is not a natural or primitive institution. St Ambrose here, as throughout his treatise, is largely dependent on Cicero's treatise of the same name, and we may be fairly certain that Cicero's words, "Sunt autem privata nulla natura,"¹ are the text which he is amplifying. It is not very easy to give any very definite meaning to Cicero's phrase: that of St Ambrose is a good deal easier, for, as we have seen, by his time the theory of the state of nature as contrasted with the state of conventional institutions had become a commonplace of Christian political theory.

Another passage from St Ambrose will perhaps make the matter clearer. God meant, he says, the world to be the common possession of all men, and to produce its fruits for

all; it was avarice which produced the rights of property. It is only just, therefore, that a man should support the poor with some share of that which was meant for all mankind.² St Ambrose here comes very near indeed to the form of Seneca's statement of the origin of property, namely, that it arose from avarice.³ and we feel that we can hardly be wrong in looking upon the foundation of St Ambrose's theory of property as being the same as that of Seneca. With St Ambrose's view may be very well compared that of Ambrosiaster. In one passage he treats charity as St Ambrose does, as being an act of justice,—for God, he says, gives all things in common to all men.⁴

St Zeno of Verona, a writer of the latter part of the fourth century, might perhaps be taken to illustrate an almost dogmatic theory of the propriety of some system of communism: he is, indeed, speaking mainly of a community of goods among Christians, founding this upon the passage in the Acts which we have already examined, but it must be observed that the latter words of the passage extend his conception to mankind at large.¹ We think, however, that St Zeno is speaking primarily in a practical sense—that he wishes to put in the strongest possible way the obligation of charity and active benevolence: he certainly puts the matter in a very strong way, for he continues, after the passage we have quoted in the note, to say that the obligation to give to those who need is not to be limited even by the duty of providing for a man's own family.

With these views we must compare those of St Gregory the Great. In one passage he deals with private property in much the same spirit as St Ambrose and Ambrosiaster. He treats the earth and its products as the gifts of God to all men, and therefore regards almsgiving as an act of justice, not of charity. It is evident that he does not regard private property itself as wrong, but, on the other hand, he does not seem to regard it as an absolute right. On the contrary, if a man uses it only for himself, he regards his action as unjust.²

We should suggest that in this conception we have the beginnings of a distinction which became very important in the Middle Ages, and is very carefully drawn out by St Thomas Aquinas—the distinction between property as a right of distribution, and property as a right of personal use. St Thomas holds that private property is not an institution of natural but of positive law, and that the right of property only extends to the acquisition and distribution of things: so far as their use is concerned, men are bound to treat them as things pertaining to all. A man has the right to use what he needs, and St Thomas does not take this in any narrow sense, but beyond this a man only holds his property for the common use.¹ We should suggest that the passages of the Fathers which we have just examined show us the germs out of which this theory grew. Property is not primitive but conventional; it is not therefore illegitimate, but, on the other hand, it is not an unrestricted right: the circumstances of the world and of human nature may make it necessary that men should take things to themselves from the common stock, but they do this subject to the responsibility of using all that they do not themselves need, for the common benefit.

St Augustine does not deal directly with the question of the primitive conditions with regard to property. But he furnishes us with a number of very important observations on the immediate source of this right. His theory of property is for the most part developed somewhat incidentally in his defence of the confiscation of the churches and other possessions of the Donatists in Africa by the Imperial Government. It would seem, from his allusions to their complaints, that they

protested that these confiscations were unjust, and perhaps even that they were outside the powers of the Government. His reply to their contentions is founded upon the following arguments. Property, he says, may be considered as an institution of the divine law or of the human law. By the divine law property is either all in the hands of God, for “the earth is the Lord’s and the fulness thereof,” or else all things belong to the righteous, and the Donatists are not righteous. By human law property belongs to this or that individual, but what human law has given human law can take away. St Augustine also maintains that the right of property is limited by the use to which it is put: the man who does not use his property rightly has no real claim to it.¹

It is clear from these statements that St Augustine regards property as normally an institution of human and positive law. His distinction between the *jus divinum* and the *jus humanum* is not indeed the same as that between the *jus naturals* and the *jus civile*, but at least it is parallel to it, and it suggests to us very strongly that St Augustine recognises no proper right in things except that which is given by the State. This view is by no means on the same lines as that of the lawyers, who regarded some form of private property as being by natural law: he does not indeed contradict the legal theory of “occupation” and the right which can be acquired in the *res nullius* by him who “occupies” it,¹ but his phrases suggest that this theory is not at all in his mind. Incidentally it is interesting to observe in the passage first quoted that the Donatists are represented as urging an argument very analogous to that on which Locke founds his theory of property, namely, that they had acquired their property by labour. St Augustine brushes this aside unsympathetically by an appeal to the Scripture, which says that the just shall devour the labour of the wicked.

We think that when we consider St Augustine’s treatment of property alongside of that especially of St Ambrose, we may feel fairly confident that they represent a tradition which differs materially from that of the jurists, a tradition probably derived from the same sources as the view of Seneca—that is, that they would, with Seneca, have classed the institution of property as one of those which belong to the conventions of organised society, and not to the primitive conditions of the human race.

At the same time, it must be observed that St Augustine’s views on the limitation of the rights of property, by the use to which it is put, finds a parallel in a phrase of Gaius, treating of the limitation of the rights of masters over their slaves: “*Male enim nostro jure uti non debemus*,”¹—a phrase repeated in slightly different terms by the compilers of Justinian’s Institutes: “*Expedit enim reipublicae, ne quis re sua male utatur*.”² St Augustine’s phrases, however, are much wider in scope, and indicate a much more developed theory than those of the lawyers. We think that this is to be connected with the theory of St Ambrose and other Fathers, that the things of the world do not cease to be held for the common good, because it is now lawful for particular persons to hold them as their own private property, and that this conception finally takes a definite form in the distinction between the right of property as an authority in distribution and the right of property as one of unlimited use.

We are now in a position to examine the meaning and significance of the references to the theory of property in St Isidore of Seville. We have already discussed his definition of the *res naturales*; we must now recall the words of this: “*Jus naturale est commune omnium nationum, et quod ubique instinctu naturae, non constitutione aliqua habetur; ut viri et femina; conjunctio, liberorum susceptio et educatio, communis omnium*

possessio, et omnium nna libertas, adquisitio eorum quae ccelo terra marique capiuntur. Item depositae rei vel commendatae pecuniae restitutio, violentiae per vim repulsio. Nam hoc aut si quid huic simile est, numquam injustum, sed naturale aequum- que habetur.”³ What does St Isidore mean by “communis

omnium possessio”? In the Middle Ages he was no doubt taken as meaning the common possession of all things j¹ and if that interpretation is correct, St Isidore sets forth in technical language the theory that by natural law all things were common, and there was no private property. But it is not quite certain whether this is the correct interpretation of the phrase. The words can be taken to mean simply that by the law of nature there is a form of property common to all men. This would not necessarily exclude forms of property belonging to groups of men or to individuals.

It is not very easy to determine which interpretation is the correct one. The nearest parallels to St Isidore’s phrase are to be found in the Digest and the Institutes; in the former we have Marcianus’s phrase: “ Qmedam naturali jure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum.”² Here the phrase itself makes it clear that the genitive omnium is possessive ; certain things are common to all. In the Institutes³ we have Marcianus’s phrase repeated with a few variations, and throughout the discussion of property we find the genitive case used in the same sense— e.g., “Communia sunt omnium haec”; “ Singulorum autem hominum multis modis res fiunt.” As far, then, as the grammatical construction is concerned, the precedents in legal phraseology seem to point to the genitive case in St Isidore’s phrase as being possessive. It must be observed, however, that the legal phrases are not absolutely parallel: communis is not connected with possessio. But, further, St Isidore goes on to mention certain methods of acquiring property, “Acquisitio eorum quae coelo, terra, marique, capiuntur,”⁴ and certain moral rules which only exist in a condition of things where private property exists, “Depositae rei vel commendatm pecuniae restitutio,” and all, it must be noticed, as belonging to the jus naturale. It is difficult to understand this, if St Isidore means to say that by natural law all property is common to all: at the most, it may

be suggested that St Isidore is inconsistent with himself, and that it is idle to expect a thorough and completely thought- out explanation of the subject from him. It must also be observed that St Isidore in his definition of the jus gentium, does not indicate that private property belongs to it, as he does, for instance, with regard to slavery, and that there is no reference to property in his definition of the jus civile.¹

It seems to us that for the present we must take it as uncertain whether St Isidore follows the tradition of the Fathers and the Stoics in thinking that private property is not an institution of the natural law, or the general tradition of the lawyers that even by the natural law some things belonged to individuals. The general tendency of the Fathers is, we think, clear, and in the history of political theory this is the important point, for we are thus able to discover the origin of the dogmatic and developed mediaeval theory.

We can now look back over certain general characteristics of patristic political theory, and we think it has become plain that this turns upon the distinction between the primitive or natural state, with its natural law and institutions, and the actual state, with its conventional institutions adapted to the new characteristics and circumstances of human nature and life.

With regard to the theory of human equality and the institution of slavery, the theory of coercive government, and the theory of property, we have seen that the patristic view turns upon this distinction between the natural and primitive, and the conventional and actual. Neither slavery, nor government, nor property are institutions of the natural law, and they did not exist in the natural state. There was a time when men were innocent—when, therefore, these institutions did not exist, when they were not needed. Out of those conditions men passed through sin, their nature was changed and corrupted, avarice, hatred, and the lust of domination possessed them. New institutions, founded in some measure upon these vices, were needed to correct these same vices. Slavery and government and private property are institutions arising from the vicious tendencies of human nature, as it is, but they are also the instruments by which these vices are corrected. The state and condition of nature is by the Fathers identified with the state and condition of unfallen man.

It is evident, we think, that under some difference of phraseology the Fathers are really carrying on the same theory as that of the Stoics as represented by Seneca. The relation of this to the political theory of the lawyers is more complex, but it is clear that they are related, and that, in some measure at least, it is justifiable to explain the two systems by comparing them with each other. We think that the fact that the entire patristic theory turns upon the distinction between the natural and the conventional state, expressed indeed under the terms of the theological conception of the Fall, but obviously reflecting, not any exclusively Christian conception, but rather some widespread assumption of popular philosophy, encourages us in thinking that the same type of thought lies behind the obscurer references of the lawyers.

It appears to us that it is correct to say that in considering the meaning of justice in human life these thinkers found themselves compelled to recognise that there was an apparent inconsistency between some of the great institutions of society and that natural or essential equality of human nature which they had learned from their experience of the universal empires. Slavery, therefore, which Aristotle could explain by a theory which was at least in many respects reasonable, to them was a real difficulty, and what they thought of slavery would naturally extend itself to government. On the other hand, they recognised instinctively, if we may use such a phrase, that human life, as it actually is, needs discipline, needs an order enforced by coercion. And thus they came to make a distinction between an ideal, which they think of as also the primitive condition of man, and the actual. Ideally, man, following his truest nature, obeying the laws of reason and justice, which he always, in some measure, recognises, would have needed no such coercive discipline. But, being what he is, a creature whose true instincts and nature are constantly overpowered by his lower nature, it is only by means of a hard discipline that he can be kept from an anarchy and disorder in which all men would be reduced to an equal level of misery and degradation. Their theory is properly a justification of coercive government, but, naturally enough, the institution of slavery being actually in existence, and appearing, as it must naturally have done to them, to be essential to the whole fabric of civilised life, they interpreted it as another form of discipline. Private property also, with its enormous inequalities, they could not accept as a primitive and natural institution. In a primitive or natural state the rights of property could have been nothing more than the

right to use that which a man required. But again, in face of the actual condition of human nature, in view of the avaricious and covetous tendencies of human nature as it actually is, they found that a formal regulation of the exercise of the right to use was necessary. Private property is really another disciplinary institution intended to check and counteract the vicious dispositions of men.

The thinkers of this philosophical tendency, then, find a just meaning in the great institutions of human society, human nature being what it actually is, but they conceive of these institutions as being dominated by the end which they serve. They are intended to correct the vicious dispositions of men. They are only justified as far as they actually do this. The equality of human nature still dominates all just order. All institutions must be reconciled with this in some sense. Government is intended to correct the evil tendencies of man, but should respect his true qualities. Slavery is justifiable as a necessary discipline of human life, but the man continues in the slave. The institution of private property is necessary to reduce the contradictory claims of men to some order, but the good things of the world are still intended for the use of all. The theory of Natural Law and the Natural State is then partly a theory of the origin of human life and institutions, but it is also a theory of the principles of justice, by which all the actual institutions of life are to be tested and corrected.

CHAPTER XIII.

THE SACRED AUTHORITY OF THE RULER.

WE have now to consider the theory of the nature and immediate source of authority in the Christian writers. We have seen that in their view the institution of Government is not primitive, but is made necessary by the vices of human nature. But Government is a divine institution, a divine remedy for man's sin, and the ruler is the representative of God, and must be obeyed in the name of God. It will be easily understood that the conception was capable of a development which should make the king or ruler the absolute and irresponsible representative of God, who derives his authority directly from God, and is accountable to God alone for his actions. This conception, which in later times became the formal theory of the Divine Right of the monarch, was, as we think, first drawn out and stated by some of the Fathers, notably by St Gregory the Great. It must at the same time be observed that such a conclusion was not necessary, nor was it at first actually developed. The actual tendencies of the patristic theories are very complex; we can very clearly see how the theory of the Divine Right arose out of the general theory of the sacred character of the civil order, but there are many other tendencies in the political theory of the Fathers, and some of their phrases and theories became in later times of the greatest importance in counteracting the arguments of the absolutist thinkers.

We begin by examining the development in the Christian writers of the theory of the authority of the civil ruler, as the representative of God. We have already mentioned some of

the strong phrases used by the early Christian writers to express their sense of the duty of obedience to the civil ruler. We referred to the words of Theophilus of Antioch, in which, while repudiating the worship of the king, he acknowledges that Government is in some sense committed to him by God, and that Christian men will therefore honour and obey him.¹ We should observe that Irenaeus, with whose discussion of the origin and object of Government we dealt fully, makes a statement with regard to civil rulers which is of

great importance in relation to certain developments of the later theory. He has pointed out that God has given men rulers as a remedy for man's sin and vice, but he adds that often God gives men evil rulers to punish their wickedness.² The ruler is not only the minister of God's remedy for sin, but the instrument of His punishments. We may doubt whether Irenaeus had in his mind the conclusions which might be and ultimately were connected with this view, but it is at least important to observe its appearance thus early in Christian theory. St Optatus of Milevis, in his treatise on the Donatist schism in North Africa, expresses the conception, that the ruler is the representative of God, in a still more explicit fashion. It appears from a passage in this treatise that when the Imperial authority interfered on behalf of the Catholic party, the leader of the Bonatists indignantly protested that the Emperor had no concern with Church affairs. St Optatus replies by urging St Paul's commands to Christian men, that they should offer up prayers for kings and those in authority, and asserts that the Empire is not in the Church, but the Church in the Empire, and that there is no one over the Emperor but God only, who made him Emperor.³

This theory of the ruler as the representative of God is most clearly expressed in a phrase used for the first time, as far as we have been able to see, by Ambrosiaster, if we may assume the correctness of the identification of the author of the 'Quaestiones Veteris et Novi Testamenti,' once attributed to St Augustine, with the author of the commentaries on St Paul's Epistles, once attributed to St Ambrose.¹ In one passage he says that the king is revered on earth as the "Vicar of God," and in another passage he draws out his conception in a very curious distinction. The king has "the image of God as the Bishop has that of Christ."² We shall find this distinction again in Cathul-
fus in the ninth century :³ it is very interesting and curious, but we do not pretend to be able to interpret it. The title of "Vicar of God" is important, as summing up the conception that the authority of the ruler is derived from God Himself. In the Middle Ages it might mean much more than this, but it would be improper to read later conceptions into a writer of the fourth

century. In the last passage he also discusses the question of the conduct of David towards Saul, and there is considerable significance in his discussion. He evidently thinks that the divine character of the office of kingship cannot be lost owing to any misconduct of the ruler. The sanctity of the office gives sanctity to any ruler, even though an idolater. It is clear that the writer is much influenced by the Jewish conception of kingship, but of this we shall have more to say presently.

We must, however, observe that in another of these "Questions" the author seems to take up a somewhat different position. He evidently believes that there may be a wholly evil form of authority which is not from God, but it is extremely difficult to say what he understands this to be, and what is the test of its character. It does not appear to consist in its unjust character or actions, for the writer says expressly that a man sitting on the throne or chair of God may oppress the innocent; and that we must then say that the judgment, but not the throne, is unjust.¹ The phrases are very obscure, but may tend in some measure to qualify the judgment which we might have founded on the preceding passages.

We have then a theory that the ruler is the representative of
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God, and that whatever his conduct may be, he does not cease in some sense to have this character. St Augustine expresses the same conception with a certain added emphasis. He mentions Nero as an example of the worst type of ruler, but adds that even such rulers receive their power through the providence of God, when he judges that any nation may require such governors.¹ St Isidore of Seville expresses the same view, and even thinks it necessary to explain away a passage of Scripture which, as it appeared to him, might be interpreted as contradicting the theory. The prophet Hosea, as he quotes him, had said of certain kings that they reigned, but not by the appointment of God. St Isidore explains that this means that God had given them to their people in His anger. He quotes the same prophet as saying, "I shall give them a king in my wrath," and concludes that a wicked ruler is appointed by God just as much as a good ruler. The character of the ruler is adapted to the character of the people: if they are good, God will give them a good ruler; if they are evil, He will set an evil ruler over them.² How far St Augustine and St Isidore foresaw the conclusions that might be founded upon such statements it is difficult to say. St Augustine does not, so far as we have seen, discuss the question in detail; and St Isidore, as we shall see presently,

evidently held, along with this view, others which have a somewhat different tendency.

The conclusions, however, which are not drawn out by St Augustine and St Isidore are drawn out and stated with the greatest emphasis by St Gregory the Great. We may notice first that he treats the relation of the evil ruler to God in the same manner as St Augustine and St Isidore, and argues like them that a good ruler is God's reward to a good people, an evil ruler God's punishment on an evil people. Whether, therefore, the ruler is good or evil, he must be revered as one who derives his authority from God.¹ But Gregory the Great goes much further than this. Commenting upon the conduct of David towards Saul, he points out how David is said to have refused to lay his hand on the Lord's anointed, and even to have repented that he cut off the hem of his garment. He takes Saul to stand for an evil ruler, and David for a good subject, and he interprets David's attitude as signifying that good subjects will not even criticise rashly or violently the conduct even of bad rulers: for to resist or offend against a ruler is to offend against God, who has set him over men.² And lest we should take this to be an isolated phrase, it is well to observe that he recurs to the matter in his treatise on the Book of Job,¹ and restates the same view with an equal, perhaps even with slightly greater, emphasis.

There can be no doubt that we have here the doctrine of the sanctity and Divine authority of the ruler in a very strong form: even the seventeenth-century apologists of the Divine Right hardly go further in preaching the necessity of obedience and the wickedness of resistance. It is from the doctrine of St Gregory the Great that the religious theory of the absolute and irresponsible authority of the ruler continually drew its strongest arguments, both in the Middle Ages and later. Other elements, no doubt, both of theory and of actual circumstance, go to produce the later theory, but the authority of St Gregory the Great was a continual protection to those who maintained it.

It may be asked whether the conception of St Gregory the Great was an entirely abstract one, or whether it actually governed his conduct. We think that its influence can be traced, in some degree at least, in his actual relations with the Emperors. Knowing as we do the great force and capacity of Gregory the Great as an administrator, and the

energy with which he defended and pushed forward what he considered to be the rights and authority of the Roman See, we cannot but be in some measure astonished at the extremely deferential, sometimes almost servile, tone which we find, at least occasionally, in his letters to the Emperors. We may take as an example a letter addressed to Anatolius, the representative of the Roman Church at Constantinople, with regard to the wish of the Emperor that John the Bishop of Primo Justiniana should be deposed on account of his bad health. Gregory protests against such action as being wholly contrary to the canons, and unjust, and says therefore that as far as he is concerned he can take no part in such action. But, he concludes, it is in the power of the Emperor to do what he pleases,—he must act according to his judgment: what the Emperor does, if it is canonical, Gregory will follow; if not canonical, he will, so far as he can do so without sin, endure.¹ The tone of the letter is not undignified, but it is a little strange to find Gregory even appearing to acquiesce in an open breach of canonical rule by the Emperor, especially when we remember that there was quite another tradition in the Western Church than this, as we shall presently see.

Another example will be found in a letter written to the Emperor Maurice with regard to a law issued by him, forbidding the reception in monasteries of soldiers and other persons who were responsible to discharge various public duties. Gregory is much distressed about the law, and begs Maurice to consider what emperor ever issued such a regulation. (It appears from Ep. 64 in the same book that Gregory believed that this had been done by Julian.) He urges that for some men salvation is only possible if they leave the world and give themselves wholly to religion, and he warns Maurice that Christ will in the last day demand from him an account of his conduct in having withdrawn men from the service of Christ. And yet he concludes the letter by saying that, in obedience to the Emperor's commands, he has caused the law to be sent on to various regions. He has obeyed the Emperor, and has delivered his soul by protesting.¹ It is certainly strange to find Gregory, who feels so strongly the impiety of such a law, still acting as an agent for its promulgation, instead of refusing to do this in the name of the Christian law and his own ecclesiastical position. It is true that we must balance the tone of these letters with that of a later one addressed to Boniface, the representative of the Roman see at Constantinople, with reference to a question of the jurisdiction of the Bishop of Corcyra. It appears from this that the Emperor Maurice had given some decision upon the subject, and Gregory speaks of this as wholly void, as being "*contra leges et sacras canones*." The Bishop of Nicopolis, the Metropolitan of Corcyra, had given a different judgment, to which Gregory says he had given his approbation. But Gregory adds that, as the Emperor Maurice had given a decision, he had abstained from publishing his own decision lest he should appear to act contrary to the imperial command and in contempt of it. He therefore instructs Boniface to do what he can to persuade the Emperor to issue an order confirming the judgment of Gregory.¹ Gregory's tone is very emphatic about the illegality and invalidity of the action of Maurice, but it must be observed that he carefully refrains from publicly denouncing it, and

setting his own judgment, or that of the Metropolitan, against it; and hopes to gain his point by persuading the Emperor to agree with his judgment and to issue an order expressing this.

In Gregory the Great, then, we find this theory of the sacred character of government so developed as to make the ruler in all his actions the representative of God, not merely the representative of God as embodying the sacred ends for which the government of society exists. The conception is, so far as we have seen, almost peculiar to some Christian writers. We have not observed anything which is really parallel to the conception in the legal writers, and even in Seneca and Pliny we have only indications of an attitude of mind which might be capable of development in this direction. The theory is a somewhat irregular and illogical development of the Christian conception of the divine character of the civil order.

It will naturally be asked, What were the circumstances under which this theory grew up. We think that we can trace the development of this conception to three causes : first, the need of correcting that anarchical tendency in the primitive Church to which we have already referred ; secondly, the relation between the Christian Church and the Emperor after the conversion of Constantine ; and, thirdly, the influence of the Old Testament conception of the position of the King of Israel.

We think that the necessity for counteracting the anarchical tendencies in the primitive Christian societies was probably a very real cause of the tendency to exaggerate or misstate the divine authority of the ruler. We think that the great emphasis laid upon the sacred character of the civil order in the New Testament—an emphasis which is maintained by writers like Clement of Rome and Irenaeus—is a very real indication of a danger which menaced the Church, and led naturally to just the same kind of exaggeration as did the parallel phenomena in the sixteenth century. If we add to this the imperious need which lay on the Christian societies to disarm the hostility of the Empire, we shall, it seems to us, find one reasonable explanation of the tendency to overstate the sanctity of authority in the earliest ages of the Church.

With the conversion of the Empire to Christianity no doubt these conditions were greatly altered. But while, as we shall see presently, many of the Christian writers from the fourth to the seventh centuries illustrate conceptions of quite another kind from those which we have just discussed, yet in this period, too, there were continually in operation circumstances which tended to make the attitude of the Church towards the Emperors one of a somewhat servile deference. We may find an extremely good illustration of the influence of these circumstances in that passage from St Optatus¹ which we have already considered. In the case of the Donatist dispute the Empire at last exercised its authority to put down what it considered a schismatical faction. And it is easy to see from the tone of St Optatus that this intervention was unhappily as welcome to many Churchmen as it was distasteful to the Donatists.² Donatus urged that the Emperor had nothing to do with Church affairs ; St Optatus bids him remember that the Church is within the Empire, and that the Emperor has no superior save God. The truth is, that with the conversion of Constantine the Emperor became the patron and protector of the Church, and it would be easy enough to trace in many cases the effect of this protectorate on the course of Church disputes. Churchmen would resist the Emperor when he happened to be opposed to their view; but when he agreed with them, they were only too apt to fall into the habit of

regarding his action against their enemies as that of a truly sacred authority. The emancipation of the political theory of the Church from such conceptions as those of Gregory the Great must be traced in large measure to the actual contests between the Church and the Empire.

It is, however, possible that these influences would not alone have been sufficient to produce so rigorous a theory as that of Gregory the Great, had they not been reinforced and confirmed by traditions which the Christian Church inherited from the religion of Israel. We can hardly doubt that, directly, the theories of St Augustine and St Isidore on the Divine appointment of even wicked rulers, and St Gregory's theory of the duty of submission even to such rulers, are drawn from the Old Testament conception of the position of the king of Israel. According to the tradition of the first Book of Samuel, the monarchy was indeed instituted against the advice of the prophet, who is taken as speaking in the name of God; but the narrative of the same book and of the other historical books makes it very plain that the king, when once anointed, was looked upon as the anointed of the Lord,—that his person and his authority were sacred. There may, indeed, be traces in the Old Testament of other views than this, but this is the normal view of the monarchy in Israel, a view which possessed no doubt a special force with regard to the monarchy of the house of David. Such conceptions with regard to the sanctity of monarchy were probably in no way peculiar to Israel, but belonged to many oriental nations; but it was largely through the Christian Fathers that they came into the West. The passages to which we have referred will make it sufficiently plain that it is in relation to the Old Testament that these views are developed by the Fathers. We may at least reasonably say that the tradition of Israel provided the centre round which such opinions took definite shape and form.

In St Gregory the Great, then, we find in definite and systematic form a theory of the source of authority in Government which is very sharply contrasted with that which we have seen to be characteristic of the legal writers. They trace the source of all authority in the State to its fountainhead in the people. St Gregory traces the authority of rulers directly to God. The history of mediaeval political theory is very largely the history of the struggle between these two views, in which, however, for many centuries, the combatants change places. For, at least from the eleventh to the fourteenth century, it is the Imperialist party which defends the theory of the Divine authority of the ruler, it is the ecclesiastical which maintains that his authority is derived from the people. We have to consider how it was that this change took place, and to do this we shall have to examine in detail the history of the political ideas especially of the ninth century.

But before we proceed to do this we have still to examine some other tendencies of thought in the Christian Fathers. We shall see that besides that tradition which we have so far been examining, there are others which, as we think, greatly influenced the political theory of the ninth century.

CHAPTER XIV.

AUTHORITY AND JUSTICE.

So far we have endeavoured to disentangle the history and significance of a political conception, which, as it appears to us, was first, in Western thought, developed by the Christian Fathers,—the conception of the Divine authority of the ruler, the doctrine that the ruler is absolute relatively to his subjects, responsible only to God. It would, however,

be a great mistake to suppose that this theory represents the whole contribution of the Christian Fathers to this portion of political theory. There are many other elements in their conception of the nature of authority in the State; one or two of the great Fathers, indeed, seem to tend in quite another direction, and with regard to them all it must be recognised that the elements of their theory on this matter are highly complex, perhaps a little confused. We must consider some general aspects of their thought, arranging them as well as we can.

While the Christian Fathers as a rule think that the institution of coercive Government is not primitive or natural, in that sense, they look upon the institution as being good, inasmuch as it is a remedy for the confusions and disorder which sin has brought into the world. It is true, as we have seen, that they sometimes think of it as being a punishment as well as a remedy for sin ; but, normally, they think of the State as an instrument for securing and preserving justice, and they regard it as the chief duty of the king as ruler to benefit his people by maintaining justice. We have already observed that St Paul's assertion of the Divine character of the authority of the State rests upon the assumption that the State rewards the good and punishes the evil,—that is, that it maintains justice.¹

In the second century we find Ireneus in very plain terms threatening unjust rulers with the judgment of God, assuring them that God will certainly visit their wickedness upon them ;² and if we turn to the Alexandrian Fathers, we find Clement defining a king as one who rules according to law, and who is willingly obeyed by his subjects,³—that is, if we may so interpret Clement's meaning, a king is one who follows not merely his own caprice or desire, but governs according to those rules of public action which are designed for the attainment and preservation of justice, and whom his subjects willingly obey as representing their own just desires.

When we pass to St Ambrose in the latter part of the fourth century, we find all these conceptions drawn out and developed very clearly and fully. To St Ambrose justice and beneficence form the “ ratio ” of the State :⁴ justice is that which builds up the State, while injustice destroys it.⁶ This conception is very significant, especially when we compare it, as we shall have to do presently, with St Augustine's attempt to define the State; and it finds its proper development in the discussion of the relation of the unjust person who discharges an office of Government, to the sacred character of the institution of Government itself. St Ambrose seems to mean that he only is properly the minister of God who uses his authority well:⁶ the passage is, indeed, somewhat obscure, but that seems to be his meaning.

But this is not all that is worth observing in St Ambrose's theory of the institution of Government. It is interesting to notice that he lays some stress upon the attitude of the ruler towards liberty. In a letter to Theodosius, on the subject of certain demands which had been made upon the Church, and against which St Ambrose protests, he urges the importance of the permission of freedom of speech and remonstrance; and while, no doubt, he is thinking primarily of the freedom of ecclesiastics in relation to the civil power, he shows some sense of the significance of the conception of liberty in the political order: good rulers, he says, love liberty, while bad rulers love slavery.¹ It would of course be very foolish to lay too much stress on such phrases; but they are at least worth noting, especially as similar phrases are used both by Cassiodorus and by Gregory the Great. Cassiodorus, writing in the name of Athalaric to a certain Ambrose who had just been ap-

pointed to the quaestorship, recalls a saying of Trajan, in which he had expressed his wish that his counsellors should freely advise him, rebuking him if necessary.² Gregory the Great, in a letter not perhaps very creditable to him, in which he expressed to the Emperor Phocas his joy that he had taken the place of Maurice, hails his accession as promising to restore liberty to the people in his dominions, adding that this is the great difference between the emperors of the Commonwealth and the kings of the nations, that the former are the lords of free men, the latter of slaves.³

In later times St Ambrose was frequently quoted as maintaining that the king or ruler is bound by the laws ; and, indeed, there is more than one passage which would seem to have this meaning. In one of his letters he seems to argue that the emperor who makes the laws is also bound to obey them;¹ and in one of his treatises he seems to express an opinion of the same kind.² It must, however, be observed that in other places he uses the ordinary legal phrase, that the emperor is *legibus solutus*? It is worth observing that St Augustine also deals with the relation of the ruler to the law in terms analogous⁴ to those of St Ambrose, and, in later times, is much quoted with St Ambrose. St Isidore of Seville also urges very strongly upon the prince the propriety of his respecting his own laws. Subjects will learn obedience when they see their rulers observing the laws.⁶

With some parts of St Augustine's theory of the State we have already dealt; but St Augustine's theory has a certain completeness which we do not find in that of the other Fathers, and, at the risk of a little repetition, we think it well to try to consider briefly his theory of law and the State as a whole. We have already seen that in St Augustine's view men were

originally equal, and that the institutions of slavery and government, in which one man is the superior of another, are consequences of man's sin. The subjection of man to man is a punishment and a remedy for sin. It must be remembered, however, that this does not mean that men were by nature solitary. On the contrary, as we have already pointed out, St Augustine definitely maintains that by his own nature man is driven to seek the society of his fellow-men; society is natural and primitive. It is the organised society of the State, with its coercive government and its authority of man over his fellowmen, which is a conventional institution, and it may be regarded partly as punitive, partly as remedial.¹

It is important, therefore, to consider how St Augustine defines the State and what is its relation to justice. In the second book of the ' *De Civitate Dei* ' he gives an account of the discussion of the nature of the State in Cicero's ' *De Republica* ,' and quotes the definition of Scipio: " *Populum autem non omnem coetum multitudinis, sed coetum juris consensu et utilitatis communione sociatum esse determinat,*"² but postpones the discussion of the definition. We find this discussion in the nineteenth book. Here, after restating Cicero's definition, he explains that this means that there can be no true State without justice: when there is not justice there can be no *jus*. But, he objects, how can you speak of justice among men who do not serve God? What sort of justice is this to take men from the service of God and to subject them to demons? There is no justice in men who do such things, and there can therefore be no justice in a society formed of such men.⁸ This definition, then, will not work, and he proceeds to search for some other definition which may make it possible to admit that Rome had been a true State. This is given in a later chapter of the same book, and is as follows: " *Populus*

est coetus multitudinis rationalis rerum quas diligit concordi communione sociatus." A State may be more or less corrupt, but so long as it consists of a multitude of rational beings associated together in the harmonious enjoyment of that which they love, St Augustine thinks it may be regarded as a State or Commonwealth.¹ This is practically Cicero's definition, but with the elements of law and justice left out. No more fundamental difference could very well be imagined, although St Augustine seems to take the matter lightly; for Cicero's whole conception of the State turns upon this principle, that it is a means for attaining and preserving justice.

This definition does not seem to represent a casual or isolated judgment of St Augustine, corrected perhaps at other times. He does not, indeed, so far as we have seen, formally set out to define the nature of the State in any other place, but he alludes to the matter more than once, and always in the same sense. In one letter he says: "What is a State (civitas) but a multitude of men, brought together into some bond of agreement?"¹ and again, in another letter, "A State is nothing else but a harmonious multitude of men";² and again, in one of his treatises, he urges that every one must recognise the importance of the order of the State, which coerces even sinners into the bond of some earthly peace.³ These phrases would not, if they stood alone, be sufficient to make clear St Augustine's conception of the State; but when taken with the definition which we have just considered, they seem to indicate that his omissions from Cicero's definition are not accidental, but more or less deliberate and considered.

It must at the same time be recognised that once at least St Augustine uses a phrase which would seem to point in another direction. In the 'De Civitate,' after discussing the comparative advantages of great dominions, and of living in peace and goodwill with one's neighbours, he draws out a comparison between a band of robbers or pirates and a kingdom, and seems to mean that the only point of distinction is that the latter has the quality of justice.⁴ Here at least St Augustine expresses himself in the terms of Cicero's conception of the State. And with this passage we may compare a definition which is obviously closely related to that of Cicero,—nothing can be properly called *jus* which is unjust;⁵ and an interesting passage, in which St Augustine describes the characteristics of justice in language taken, in the main, from Cicero's treatise, "De Inventione," but which in part also suggests the definitions of Ulpian.¹ These definitions of justice, however, only show that St Augustine follows the general tradition of the relations of law and justice, and the nature of civil justice.

The first mentioned phrase is, as far as we have seen, isolated, and can hardly be cited in correction of the deliberate and considered omission of the quality of justice in his formal definition of the State. It must, at the same time, be recognised that St Augustine is compelled to abstract the quality of justice from the definition of the State, not by any course of reflection upon the nature of the State, but by his theological conception of justice,—a conception which might be regarded as true upon his premisses, but which can only be understood as related to those premisses.

We cannot express a decided judgment upon the very interesting question whether St Augustine's definition of the State exercised any great influence upon the course of political speculation. We have not found that this part of his work is often cited; indeed, we have not come across any instance of this in the earlier Middle Ages at all. But it is hardly possible to escape the impression that, however

indirectly, this attitude of St Augustine towards the conception of justice in society is related to that conception of the unrestricted authority of the ruler, which, as we have already seen, takes shape about this period, and was drawn out so sharply by St Gregory the Great. As we have already seen, the tendency to confuse between the Divine authority of the institution of government, and the Divine authority of the individual ruler, can be traced back to very early Christian writers, but in St Augustine this tendency is very much developed. We have already quoted one passage from his writings which illustrates this point,¹ but it will be useful to cite some other passages in which he draws out in detail his view that the worst, just as much as the best, kings draw their authority from God Himself.² We have already seen that it is out of this judgment that there grows the dogmatic conception of Gregory the Great, that the ruler must not under any circumstances be resisted. The references to the subject in St Augustine are too scanty to enable us to form a very complete theory of the matter; but, so far as they go, we should be inclined to suggest that there is some real connection between a theory of the State which deliberately omits the characteristic of justice, and the theory that the ruler, whether just or unjust, must in all cases be looked on as holding God's authority. It would appear, then, that the political theory of St Augustine is materially different in several respects from that of St Ambrose and other Fathers, who represent the ancient tradition that justice is the essential quality, as it is also the end, of the State.

We have still to consider two Christian writers of the fifth and seventh centuries who seem to represent the more normal conception of the subject. The first of these writers, Cassiodorus, does not indeed furnish us with any detailed definition of the nature of the State, and he uses phrases which are sometimes ambiguous, but he does in the main seem to present the same judgment as that of St Ambrose, on the importance of justice in the State. He defines justice very much in the terms of Ulpian, as that habit of mind which renders his own to every man;¹ he recognises that it is this which truly magnifies the ruler, and causes the State to prosper;² and he exhorts the ministers of State to just conduct, as that which alone renders them worthy of the name of judge.³ Law is the true instrument of social progress, the true method of human happiness, and this because law represents justice.⁴ He quotes the great passage from St Paul on the authority of the ruler, with an interesting comment, pointing out that it is the ruler whose commands are just who is to be obeyed;⁶ and, as we have seen, he describes the character of the good prince as that of one who is always ready to hear those who speak in the name of justice, and who delights in a counsellor who will always speak for the State, even when he has to criticise the ruler to his face.¹ The true king is one who can govern and control himself.²

On the other hand, Cassiodorus seems to regard the king not only as the source of law, but as one who normally stands above it: the king feels himself bound by his own pietas when he is not bound by anything else;³ and further, the king is only accountable to God—he may transgress against Him, but cannot be said to sin against others, for there is none who can judge him.* It is, however, possible to interpret this last passage as merely representing the legal theory as to the ruler being *legibus solutus* and the constitutional conditions which provided no court of justice to which the king was accountable. These phrases of Cassiodorus are interesting, but do not add much to what we have already seen in other Christian writers.

St Isidore of Seville presents us with some of the same ambiguities as Cassiodorus, but his treatment of the subject of the nature of Government is on the whole clear. He gives us very briefly a statement of the beginnings of social life among men. In his definition of *oppidum* he says that men were originally naked and unarmed, defenceless against the inclemency of heat and cold, and the attacks of wild beasts and of other men. At last they learned to make for themselves huts in which they might be sheltered and safe, and these were gradually collected in towns.¹ But much more important than this is his definition of the nature of the State. He defines *civitas* as a multitude of men joined together by the bond of society:² this is ambiguous, and he might be following St Augustine; but his definition of *populus* makes his meaning plain. *Populus* he defines as a multitude of men joined together in society by an agreement of law, and harmonious fellowship.³ It is both interesting and important to see that St Isidore, whether intentionally or not, goes back from the position of St Augustine to that of Cicero, and makes justice an essential part of the nature of the State.

St Isidore carries out a conception of the same kind in his definition of the true king and the sharp contrast he draws between him and the tyrant. The king, he says, derives his name from his function of ruling, and to rule means to correct: if the king does what is right he will keep his name, if he does evil he will lose it. St Isidore quotes an old proverb which says, "Thou shalt be king if thou do right; if not, thou shalt not be king," and he defines the chief virtues of a king as Justice and *Pittas** With this definition is sharply con-

trasted that of the tyrant, the wicked ruler who cruelly oppresses his people.¹ He carries out the same conception of kingship in greater detail in his 'Sentences.' In one place he again says that kings are so called from ruling, and lose the name if they transgress.² In another passage, which we have already quoted, he explains that the object for which kings and princes were appointed was that the people should be restrained from evil and directed to good.³ The duty of the ruler is therefore to set forward justice in truth and reality;⁴ and he will be guilty of a very great crime if he appoint unjust judges.⁶ And finally, in a chapter already cited, which is often referred to in later times, having been embodied by Gratian in the *Decretum*, he maintains that it is a just thing that a prince should obey his own laws.⁶

It is true that along with these judgments he also maintains with St Augustine that evil kings are sent by God as a judgment upon evil peoples.⁷ We have already quoted his words, and have seen that this notion probably assisted in the development of the theory that the ruler was in such a sense the representative of God that he could in no case be resisted. But St Isidore himself does not draw this conclusion; rather he seems in the main to hold that the legitimacy of Government is determined by its character,—that it is only as far as the ruler promotes justice that he is to be looked upon as a true ruler at all.

We have endeavoured in this chapter to put together the judgments of the Fathers upon the place of justice in society. We have seen that, with the exception of St Augustine, they seem to show the persistence of the conception that the end of the State is the attainment of justice, and that the quality of justice is essential to the legitimacy of any organisation of society. We think it is important to observe this, for in some measure it seems to counteract that tendency of some of the Christian Fathers towards the theory of the absolute Divine authority of the monarch, and the consequent obligation of unlimited

obedience. The truth is, probably, that the Christian Fathers had no clearly and completely developed conception of the nature of civil authority. One or two principles with respect to this were firmly fixed in their minds, but the conclusions which might be more or less legitimately derived from these principles were undefined, and not generally thought out, still less brought into logical coherence with each other. They were convinced of the Divine nature of the authority of the State, they were convinced that disobedience to that authority was in normal cases an offence against God. Some of them drew from this the conclusion that all authority, under all circumstances, was from God, and that even an unjust and oppressive command of the ruler must be obeyed. On the other hand, they were for the most part equally clear that the foundation and end of civil authority was the attainment of justice, and some of them more or less distinctly apprehended, as a consequence of this principle, that an unjust authority was no authority at all. The great principles which they held were of the profoundest and most permanent significance; but they had not drawn out from them a complete and coherent theory of the nature of authority in society.

CHAPTER XV.

THE THEORY OF THE RELATION OF CHURCH AND STATE.

WE have endeavoured to recognise something of the complexity of the patristic conceptions with regard to the nature of authority in the State. We have at least seen that while there is in the Fathers a tendency towards a theory of absolutism in the ruler, which finds its complete expression in St Gregory the Great, there are also other tendencies which seem to counteract this. These tendencies may be said to centre round the conception of justice, in spite of the fact that St Augustine's hold upon this conception is so loose; for in this matter, as in so much of his theology, St Augustine probably represents, not the normal, but a somewhat eccentric though influential, mode of thought. We think it is correct to say that the Fathers tend to think of the principle of justice as of something which lies outside the power of the civil authority—something which it does not create, and to which it is in some measure answerable. We may perhaps justly consider that there is some relation between this conception of a principle of justice outside the civil order and the gradually developing consciousness that while the civil order is itself one manifestation or expression of the principle of justice, this same principle finds expression in another order, the ecclesiastical, which is, properly speaking, not so much within the State as parallel to it. We find in the Fathers the consciousness that the Church has its own laws and principles, its own administrative authority, which is not at all to be regarded as dependent upon the State, but as something which stands beside it and is independent of it; that the relations between the Church and the State are those of two independent though closely related powers, relations which it becomes necessary, as time goes by, to understand and define more clearly.

Before the conversion of Constantine, indeed, there was little question about the relation between the State and the Church: the Church was not merely separate, but was generally treated by the State as an enemy—an enemy which it would be well, if possible, to destroy. The Church was a voluntary society within the Empire, dependent for every public right that it might enjoy upon the grudging consent of the State. Christians asked for toleration, and maintained that they could not give up their faith and worship at the command of any earthly power; but toleration was all that they asked, and they asked it in the name of humanity, and on the ground that their religion, so far from being hurtful

to the State or to good morals, would rather tend to loyalty and good order. The Church was necessarily conscious of its independence, but this independence was a purely spiritual one, and it claimed no rights or properties of a secular kind, except as derived from the sanction and authority of the State.

The conversion of Constantine and the official Christianisation of the Empire brought with them an entirely new set of circumstances ; and the Church had to find its true place in these with much difficulty and labour. The change which the conversion of the Empire brought about does not seem to have been at all clearly recognised at first; at least we have been unable to find any source of information as to this in the literature of the time. The actual historical circumstances, however, gradually compelled men to form some sort of theory of the relation of the two societies. The relation of the Church and Church law to the civil authorities was gradually defined; great questions were indeed left outstanding, but we feel that at least some of the Fathers arrived at certain more or less clearly defined conceptions of the relations between Church and State.

We think that, while some of the Fathers use ambiguous phrases, there can be no serious doubt that after the conversion of Constantine, as much as before it, churchmen did normally refuse to recognise any authority of the civil ruler in spiritual matters. Rufinus of Aquileia has preserved in his history a report of a speech which Constantine, as he says, made to the bishops of the Church assembled in the Council of Nice. According to this report, Constantine recognised very clearly the limitations of the imperial authority in relation to Church order. He acknowledges frankly that he has no jurisdiction over bishops in spiritual matters, while they have jurisdiction over all Christians.¹ A little later than the Council of Nice, we find Hosius of Cordova, as quoted by St Athanasius, in spite of his close connection with the imperial court, repudiating in the most emphatic terms the notion that the emperor had any right to interfere in Church affairs. He warns Constantius not to intrude into ecclesiastical affairs: God had granted to him the kingdom, to the churchmen the care of the Church; he should remember that just as any one who should revolt against him would disobey God, so if he presumed to draw Church affairs under his control he would be guilty of a great fault.² Hosius's tone is very emphatic, much more so than we should perhaps have expected from the somewhat servile attitude of churchmen like Eusebius of Caesarea, and it would seem to indicate the presence of a more general appreciation, at that time, of the independence of the Church relatively to the State than has been always recognised. If such language could be attributed to Constantine, and used by a friend of the court like Hosius, we need not perhaps be surprised to find a man of the violent temper of Lucifer of Cagliari using language identical in sentiment but somewhat more unqualified in tone, in the height of the contest of the Athanasian party with the Emperor Constantius. Without these phrases of Rufinus and Hosius we should indeed have hesitated as to the genuineness of the work from which we quote. Lucifer indignantly protests that Constantius is no judge of bishops, but rather should obey them and their laws; and he concludes by saying that the emperor is not even a Christian, and appointed by God to rule his people, but only a heretic and a persecutor.¹ Lucifer's tone is like that of the spurious letters of Gregory II. in the eighth century : we might even imagine ourselves in the early stages of the Investiture controversy of the eleventh century.

Against these passages we must no doubt set certain sayings which have a somewhat different character. We have already quoted a passage from the writings of St Optatus of Milevis, in which we find represented a different attitude towards the State, and its interference with Church matters. Donatus had evidently treated the intervention of the emperor in favour of the Catholic party just as Lucifer of Cagliari had treated his interference against it, and had indignantly argued that the emperor had no right to interfere in Church matters. St Optatus urges in reply that the Church is in the empire, not the empire in the Church, and seems to treat the attitude of Donatus as that of one who set himself over the emperor, while, he urges, there is no one over the emperor but God.¹ Optatus seems to go rather far towards admitting the supremacy of the imperial jurisdiction even in Church matters.

It is natural to conjecture that some such notion lies behind that strange phrase of Ambrosiaster, to which we have already referred. He calls the king the Vicar of God, and says that he has the image of God, and the bishop has that of Christ.² The phrase is indeed very difficult of interpretation, but it is at least possible that it is intended to signify some superiority of jurisdiction.

If, then, we find in some of the Christian writers a very clear and explicit declaration of the principle that the State has no jurisdiction in Church matters, we must also recognise that others tend to a more doubtful position. We may in part explain the phrases of the latter as only referring to the power of the State to carry out secular penalties for ecclesiastical offences: no doubt the Catholic Church, when it invoked the arm of the temporal power to put down heretics and schismatics, conceived that its position was secure,—that it was for the Church to judge in spiritual matters, for the secular power to carry out the consequence of its judgments in secular conditions. But actually the policy of persecution did tend to make the State the arbitrator between different religious parties. At the same time, we do not think there can be any doubt as to the normal character of the Church theory with regard to its relation to the State. Indeed, the consideration of the views of these writers is, we think, of importance, mainly as preparing us for the examination of the much more complete treatment of the subject in the work of St Ambrose.

In St Ambrose the theory of the relation between the Church and State is more or less clearly defined. He is clear that certain rights of the Church are sacred and inviolable, in the very nature of things, and in accordance with the nature of God's ordinance in the world. He is very clearly conscious that the Church has its own jurisdiction, to which all Christian men, whatever their rank, are subject, and that the jurisdiction of the State does not extend over any strictly ecclesiastical matters.

We have already seen that St Ambrose, like all the Fathers, recognises the divine character of the civil order of society. He insists that the Christian man must render obedience to the civil ruler in virtue of his religion: not even the priest is to act disrespectfully towards the civil ruler, but, on the other hand, if the ruler commits any grave offence, then the priest must reprove him.¹ The ministers of the Church have jurisdiction over all Christian men, and their jurisdiction extends even over the Emperor or other civil ruler.² For even the Emperor is the son of the Church, subject to its authority, to its discipline: no title, St Ambrose says, is more honourable than that of son of the Church,—the Emperor is within the Church, not over it.³ We find it, therefore, very natural that we should hear of St Ambrose exercising the last discipline of the Church,

even against so pious and orthodox a ruler as the great Theodosius. The story of the exclusion of Theodosius from the Eucharist is, of course, very familiar, and it is not necessary here to detail the circumstances. For the massacre in Thessalonica Theodosius was responsible, and St Ambrose excluded him from attendance at the celebration of the Eucharist. It is perhaps worth while to cite some words from St Ambrose's letter to Theodosius, and to observe the mingled deference and firmness with which St Ambrose tells Theodosius that he cannot "offer the sacrifice" if he is present.¹

It may, perhaps, serve to bring out more clearly the significance of this event, when we observe that this action was not isolated, but that for a much smaller matter, as we learn from a letter to his sister, St Ambrose had been prepared to take almost the same action. Certain Christians had burned down a synagogue of the Jews, and some monks had burned down a church belonging to adherents of the Valentinian heresy. Theodosius, very justly, as we should probably think, ordered the Christians to rebuild the synagogue, and the punishment of the monks. But St Ambrose took another view of the matter, and regarded the action of Theodosius as being contrary to religion. He wrote him a letter on the subject, and then preached on the matter in his presence, and, the sermon ended, demanded of Theodosius an assurance that he would withdraw the obnoxious order, before he would consent to celebrate the Eucharist.² Practically, St Ambrose was threatening Theodosius with exclusion from attendance at the celebration of the sacrament.

St Ambrose, then, is very clear in his assertion of the principle that the Church exercises jurisdiction over all Christian men, even the most exalted—even over the chief of the State. And at the same time he asserts, with equal emphasis, the principle that in religious matters the civil magistrate has no authority over ecclesiastics. We have cited one of the emphatic passages in which St Ambrose asserts that in matters of faith the layman has no jurisdiction over the priest.¹ He evidently traces this rule to the divine law, and that law, he urges, is greater than the imperial;² but he also urges that the principle has been admitted by the imperial legislation. In the letter from which we have just cited St Ambrose urges this point with great persistence. He had been requested to appear before the Imperial Court, and he refuses to comply, on the ground that this was an infringement of a law of Valentinian I.³ We do not propose to enter into the history of ecclesiastical exemption from secular jurisdiction, a subject of formidable complexity, but it is necessary to observe it as illustrating the development of the position of the Church as being, within its own sphere, independent of the State.

It is not only in relation to the jurisdiction of the Church over the laity in spiritual matters, and its independence of the civil ruler in all such matters, that we can recognise in St Ambrose the sense of the existence of a power and law which is altogether outside of the sphere of the civil ruler. We can see in his writings the beginning of the importance of those questions with regard to Church property, round which so much of the controversies of later times turned. We have fortunately a tolerably full account in St Ambrose's own writings of the position he took up, when the emperor wished to insist on his giving up one or more of the churches in his diocese for the use of the Arians. In a letter to his sister he gives an account of the discussion between himself and the officials sent to demand this. They insisted that he should acquiesce promptly, for the emperor was within his rights, for all things were in

his power. He replied that if the emperor were to demand his private property, he would not refuse it; but those things which were divina were not subject to the imperial power. Further on, however, he qualifies this statement by urging that the emperor cannot lawfully seize a private house, much less the house of God. When he is again urged to surrender a church, he replies that it is neither lawful for him to surrender it nor for the emperor to accept it. The emperor, if he wishes to reign long, must be subject to God, and obey the rule to give to Caesar what is Caesar's and to God what is God's. Palaces belong to the emperor, churches to the priest, and he cannot surrender a church.¹

In the public discourse which St Ambrose delivered upon the same subject he repeats the same observations, but also throws some further light upon the question of what he understood to be the Church property, which was sacred to God. He protests his habitual respect for the emperor, but the demand for a church he cannot comply with. But, he adds, the lands of the Church pay tribute to the emperor; and if the emperor wishes to take these, he will not resist.¹ Evidently he draws a distinction between the churches and other ecclesiastical property. The distinction is one of some importance with regard to later developments of the relation of the State to Church property.

St Ambrose, then, is clear that there are distinct limitations to the imperial authority when the emperor comes into relation with religious matters. The Church has its own position and authority, which is independent of that of the State. We think that it is not unreasonable to judge that there was some relation between these clear convictions of St Ambrose and that tendency which we have already observed in him to limit the absolute authority of the civil ruler, even in secular matters—at least, to conceive of his authority as limited by the principle of justice, and perhaps as limited by the laws of the State.

In the latter part of the fifth century the question of the relation between the authority of the State and that of the Church is discussed very fully, especially in the letters and treatises of Pope Gelasius I.; and these not only show us how clearly the question was then apprehended, but also lay the foundations on which the theory of the ninth century was based. It is true that these discussions and definitions go to establish a theory of a strict dualism in society, and they are not therefore in accord with the tendency of those mediaeval thinkers who thought of society as organised under the terms of a complete unity. The development of the theory of unity in society is one of the most important of the movements which we shall have to study,—one of the most interesting aspects of mediaeval political theory: we are at the same time not certain whether its historical significance has not been to some extent exaggerated,—whether scholars have not sometimes mistaken the formal or superficial tendencies of mediaeval political thought for the fundamental. We are not quite sure whether the real importance of the conception of an absolute or formal unity in society, either in mediaeval or in modern political theory, is quite what some may imagine. But this is a subject about which we shall have more to say in later volumes. The discussions and definitions of the fifth century belong to a stage in the development of political theory when the conception of dualism in society was taking shape and making itself felt as of importance in practical administration: we can at the same time recognise in them some of the elements out of which, in later times, the theory of the complete unity of society was to be constructed.

The historical circumstances which produced the literature which we have now to examine were of a highly complex kind. The Council of Chalcedon had tried to end the disputes of the Alexandrian and Antiochene schools in the Church by a definition of the

doctrine of the union of the human and divine natures in our Lord, which was intended equally to condemn the extreme or so-called monophysite tendency of the Alexandrian and the extreme or so-called Nestorian tendency of the Antiochene school. In the main, while its decisions resulted in the separation from the Church of a certain number of extremists at each end, the decisions of Chalcedon did conclude the historical settlement of the terms of the faith of the Church with regard to our Lord's nature. But it was more than two centuries before the disputes on the subject in the Church were set at rest. The monophysite tendency was so strong, especially in Egypt, that in 482 the Emperor Zeno, with the advice ap-

patently of Acacius, Patriarch of Constantinople, issued a statement known to us as the "Henoticon," in which he tried to state the doctrine of our Lord's nature in such a way as to conciliate the Egyptians. In the West, however, and notably by the Bishops of Rome, these proceedings were looked upon with the greatest disfavour, and Felix II finally anathematised Acacius. It is not clear that Felix or his successor, Gelasius I, actually excommunicated either Zeno or any of the other emperors who remained in communion with Acacius, and with Peter, the Patriarch of Alexandria; but practically all communion with those who held to Acacius was broken off, and the Emperors and the Bishop of Rome found themselves in formal opposition to each other.

The circumstances of the time were no doubt favourable to the development of an independent attitude in the Western Church, for this was the period during which the Gothic invasions and occupation had practically destroyed all the power of the Byzantine emperor in Italy. This may perhaps partly explain the confidence of the tone adopted by the bishops of Rome towards the emperors, though it would be a mistake to think that such an attitude towards the civil ruler was unprecedented: we have indeed seen something of the same kind in the case of St Ambrose.

We may perhaps with advantage notice some details in the theory of Felix II and Gelasius I. with regard to the relations of the Church and the emperor before we discuss their formal definitions on this subject. They both assert with great emphasis the subordination even of the emperor to the Church in spiritual matters. Felix exhorts Zeno to remember that it is well for him if he strive to submit his royal will to the priests of Christ: when the things concerning God are in question, the king should learn rather than presume to teach.¹ In

the tenth letter of Pope Gelasius the same thing is said, with perhaps a little additional precision and a special assertion of the authority of the apostolic see. The secular power should learn, not judge, of divine things from the bishops, and specially from the Vicar of St Peter: not even the most powerful of Christian rulers of the world may draw such things into his hands.¹ The subject is drawn out in greater detail in the first letter attributed to Gelasius, a letter thought to have been written by him in the name of Pope Felix II. to the Eastern bishops. The emperor has no authority, Gelasius urges, to consider the cause of an ecclesiastic or to receive him to communion: this is contrary to all church order. The emperor is the son, not the ruler, of the Church: God gave the authority of ruler in His Church to bishops and priests, not to secular rulers or to the civil law. The emperor has indeed received his authority from God, and should therefore not set himself against the divine order.²

As we have said, we do not find in these letters any trace of a definite or explicit excommunication of the emperor; but it is evident from them that they do not look upon

the emperor as in any way exempt from the operation of such general disciplinary measures as they had taken. Felix II. seems to put before the Emperor Zeno the choice between communion with St Peter or with Peter of Alexandria;¹ and while Gelasius I. expresses himself in courteous and friendly terms, and repudiates the notion that he has condemned the emperor, yet we think that his phrases practically mean that communion with the excommunicate separates the emperor from the Roman Church.²

The attitude of Felix and Gelasius towards the emperor is courteous, and even deferential, but it is at the same time quite firm. It is clear that while they were reluctant to break with the emperor, to have an open quarrel with him, they had no hesitation in resisting him. It is, in this connection, therefore, very interesting to find that we have in one of the letters of Gelasius perhaps the first example of a regular enumeration of occasions on which churchmen had, as he thinks, been compelled to resist and reprove the secular ruler. Gelasius begins by referring to the rebuke of David by the prophet Nathan, and then mentions the public separation of Theodosius from the communion of the Church by St Ambrose, the rebuke of Theodosius the younger by St Leo, the action of Pope Hilary against the Emperor Anthemius, and of Pope Simplicius and Pope Felix against the usurper Basiliscus and the legitimate Emperor Zeno.¹ This enumeration of cases in which the authority of the Church had dealt with and rebuked the heads of the civil government serves to furnish us with an interesting view of the circumstances out of which arose the growing consciousness of the existence of an authority in the Church independent of, and in its own sphere superior to, that of the State.

We may again note that Pope Gelasius was concerned not only to assert the authority of the Church in all spiritual matters, but also to establish the principle that the civil power had no jurisdiction over ecclesiastical persons, at least in spiritual matters. We have a letter in which he indignantly protests to the Eastern bishops against their suffering ecclesiastical persons to be tried by secular authorities.² We are not prepared to express a definite judgment upon the extent of the immunity which Pope Gelasius claims for ecclesiastics : it is enough for our purpose to observe how vigorously he repudiates the idea of the State having any authority over them, in matters, at any rate, belonging to the Church.

The theory of the relation of the two authorities, the Church and the State, is definitely set out in the fourth Tractate and the twelfth letter of Pope Gelasius. Together these furnish us with a statement of the actual spheres of the two powers, and also with some explanation of the cause of their separation. Before the coming of Christ, Gelasius says, there were some who were justly and legitimately both kings and priests, such as Melchizedek; and Satan imitated this among the unbelievers,—hence it was that the pagan emperors held the office of Pontifex Maximus. The true and perfect king and priest was Christ Himself, and in that sense in which His people are partakers of His nature they may be said to be a royal and priestly race. But Christ, knowing the weakness of human nature, and careful for the welfare of His people, separated the two offices, giving to each its peculiar functions and duties. Thus the Christian emperor needs the ecclesiastic for the attainment of eternal life, and the ecclesiastic depends upon the government of the emperor in temporal things.¹ There are, then, two authorities by which chiefly the world is ruled, the sacred authority of the prelates and the royal power; but the burden laid upon the priests is the heavier, for they

will have to give account in the divine judgment, even for the kings of men: thus it is that the emperor looks to them for the means of his salvation, and submits to them and to their judgment in sacred matters. The authority of the emperor is derived from the divine order, and the rulers of religion obey his laws: he should therefore the more zealously obey them. If the bishop is silent when he ought to speak for the divine religion he will run great danger, and so also will he who contemns this authority instead of obeying it. If the faithful owe obedience to all priests, how much more do they owe it to the bishop of that see which God has set over all priests.¹

The most important points in these definitions of the character and relation of the two powers are, first, the dogmatic statement and careful explanation of the fact that in Christian

society the spiritual and the temporal powers are intrusted to two different orders, each drawing its authority from God, each supreme in its own sphere, and independent, within its own sphere, of the other. We shall have frequent occasion in later chapters to observe the importance of this conception of a twofold authority in society—this attempt to divide the whole field of human activity into two separate parts, and to establish an independent authority for each part. We shall see how the ninth-century writers in particular take these statements as the normal expression of their own position, and we shall have to consider how this is related to the theory of the later Middle Ages. But, secondly, it is necessary to observe that Gelasius is also conscious of the fact that while these two authorities are each independent of the other, and supreme in their own spheres, they are also dependent upon each other, and cannot avoid relations with each other; so that while each is supreme in its own sphere, each is also subordinate in relation to the other sphere. The king is subject to the bishop in spiritual matters, the bishop to the king in temporal matters. Gelasius is conscious of the fact that no division between the two powers can be complete—that we are compelled to recognise the fact that each has, in certain relations, authority over the other; and, more than this, we may say that Gelasius perhaps feels that the question which is the greater of the two cannot be wholly avoided. He restricts himself, indeed, to arguing that the burden laid upon the ecclesiastics is the heavier; but we can see in his words the beginning of a tendency whose ultimate development we shall have to trace in the scholastic writers. The definitely dualistic theory of authority in society has rarely been more clearly set out than by Gelasius, but his definitions show us the difficulties with which that theory has constantly to contend.

In the Fathers, then, we see clearly the first development of those difficult questions concerning the relations of the temporal and spiritual authorities in society, round which so much of mediaeval political theory was to take shape. There can, we think, be little doubt that in the end nothing contributed so much to emancipate the judgment of theologians from the tendency to

recognise an absolute authority in the monarch, as the clearly felt necessity of defending the independence of the Church. It was this, probably more than any other single cause, which compelled the ecclesiastical thinkers to analyse again, and more completely, the source and character of civil authority. There is, indeed, in the Fathers little trace of any very direct connection between the general course of political theory and these questions of the relations of Church and State, though it is noteworthy that St Ambrose, who is the first careful exponent of the independence of the Church, is also that one of the Fathers

who seems most conscious of the limitations of the imperial authority even in secular matters. But we think that it is very necessary to take account of the patristic theory of the relations of Church and State; for, however little they may have anticipated the ultimate significance of these questions, we, when we look back from the standpoint of the ninth century or of the later Middle Ages, can see that here are the beginnings of one of the most important elements of the later political theory.

PART IV.

THE POLITICAL THEORY OF THE NINTH CENTURY.

CHAPTER XVI.

NATURAL EQUALITY AND SLAVERY.

WE have examined the history of the political theory of the ancient world in its last stages, and the modifications introduced into this theory by Christianity. It is, we think, necessary for the proper understanding of the course of political theory to keep very clearly before us the fact that the political theory of the Fathers is that of the ancient world, that the modifications introduced by Christianity are to be regarded rather as modifications of detail than as completely or fundamentally changing the conceptions which were already current. Unless we are entirely mistaken, the Fathers take the framework of their political theory whole and ready-made from their predecessors and contemporaries, and do but fit into this framework such conceptions as are to be regarded as in some sense peculiar to themselves. As we have endeavoured to show, their peculiar conceptions are, except in regard to two subjects, not very important in character. The two exceptions to this general principle are to be found, first, in the turn they give to the theory of the sacred character of government, and, second, in their development of the relation between the temporal or civil and the religious or ecclesiastical powers in society. Here, indeed, they present to us the beginnings of modes of thought of the greatest historical significance,—modes of thought whose development and modifications we shall have to trace in considerable detail.

The Christian Fathers cannot be regarded as political philosophers, but their theory is constantly and organically related to a system of political thought which, whatever its merits or truth, may be regarded as a philosophical system, the system which centres in the theory of natural law and the contrast between the conventional and the natural state. The Fathers accept these theories, and, as we have endeavoured to show, it is only in relation to these that their own conceptions become intelligible.

When we pass to the political theory of the ninth century, we find ourselves in an atmosphere wholly different. The elements of public life are altered, the conceptions which dominate men's minds are in some most important respects new and strange; we can never forget that the barbarians have overthrown the old civilisation of the West. They may sometimes deck themselves in the trappings of the old world, they are glad to use old names and to claim the titles of ancient offices, but the world has changed. St Gregory the Great or St Augustine may have been very different men from the Roman citizens of the Republic or the Early Empire, but still they were primarily Romans, members of the ancient commonwealth, sharers in the ancient culture, while the greatest ecclesiastics of the ninth century, Alcuin, Hincmar of Rheims, or Hrabanus Maurus, are at bottom men of the new Teutonic tradition, also no doubt the heirs of what had survived of the culture of the ancient world, but still primarily men of the new world. What is true even of the great ecclesiastics is still more obviously true of the greatest laymen. The

great Charles himself may be the “Augustus,” the great and “peaceable” emperor; but he is really the head of the Franks, the representative, the repository of the tradition or the greatest and most powerful of the new Teutonic races; a great man, great ruler, but still a barbarian.

And the new world is governed by new traditions, new conceptions of life and of law, of the meaning and character of the social organisation. Not indeed that there is as yet much new theory—the time for that has not yet come—but new traditions, new customs, a new sense of the relations between the different members of the State, these meet us at every turn. The world in which we find ourselves in the ninth century is a new world, is indeed the world as we know it now, for it cannot be seriously pretended that between the ninth century and the twentieth there is such interruption of continuity even as there is between the sixth century and the ninth. When we study the Carolingian writers, we feel at once that we are studying the writings of men whose tradition of society and government is that out of which our own has directly and immediately grown. And yet there are in the social and political theory of the ninth century older elements. There is a great gulf between the Teutonic societies of the Middle Ages and the ancient empire, but there are many relations, many traditions which have been carried over from the one to the other. The new society has its own distinctive traditions, its own individual characteristics; but the men who give expression to these, the articulate representatives of the new society in literature, have inherited from the past traditions and theories which profoundly influence the new society: they have inherited a framework of political theory into which, in the end, they will fit their own independent political and social conceptions. The ninth-century writers are Teutonic politicians, but they are obviously also the disciples of the Western Fathers. Indeed they are always trying to bring their own conceptions into harmony with the theories of the Fathers. They seem instinctively to recognise the fact that they have no formal theory of their own, and constantly fall back upon the Fathers, St Ambrose, St Augustine, St Gelasius, St Gregory, or St Isidore, to find a reasoned expression of their own convictions.

At the same time, their own conceptions are often very different from those of the Fathers, and it is largely to this cause that we may attribute that appearance of incoherence, or even self-contradictoriness, which is perhaps the first characteristic which we notice when we study this literature. The truth is, that some centuries were still to pass before, in the hands of the scholastic writers, the Teutonic traditions and the general principles of the political theory of the Fathers and the Roman Jurists were to be reduced to one coherent whole.

The Fathers, as we have said, may not be political philosophers, but in reading them we feel the presence of a great framework of political theory to which even their most incidental phrases are related. The Schoolmen of the twelfth and thirteenth centuries in their turn produced a complete system of political theory by which we may again interpret even the most paradoxical of their phrases. But the writers of the ninth century are neither original political philosophers nor are they as yet fully conscious of the nature of the theory which lay behind the phrases of the Fathers. They are interested in, they are indeed profoundly concerned with, the solution of the innumerable difficulties which presented themselves to the new civilisation of Europe; they are full of interest, and often exhibit a considerable analytical power in dealing with such questions as the nature of

the royal power, the relation of the civil power to the ecclesiastical, the nature of the origin and authority of law, and they eagerly lay hold of any straw of traditional authority, or explanation, in the Fathers, or in the remains of the ancient jurisprudence, which may assist them in the practical solution of their difficulties. But they do not go beyond the practical use of the writings of the Fathers: they are not concerned with, or interested in, the question of a general and systematic philosophy of political and social relations.

We shall therefore find that there is much less of reference in the ninth-century writers to the questions of natural law, the natural condition, the relation between natural and conventional institutions, than in the Fathers. All this we shall find again when we come to discuss the scholastic political theory, but in the ninth century there is comparatively little reference to these matters. Their treatment of political theory is concerned mainly with questions regarding the nature and source of authority, secular and ecclesiastical, and the relations of these authorities to each other. This does not mean that they denied

the truth of the conceptions of the earlier writers; on the contrary, as we shall see, so far as they do refer to such general questions as those which we have mentioned, they accept the views, they reproduce the phrases, of the Fathers.

There is only one aspect of the patristic theory of the natural conditions of human nature which has an important place in the ninth-century writings, and that is the theory of the natural equality and liberty of man. Here it is evident that the ninth-century writers not only reproduce the views of the Fathers, but that they do this with intelligence and conviction. They find the authority for their view largely in those passages from St Gregory the Great's writings which we have in former chapters had to consider carefully; but it is clear that the view of St Gregory the Great and the other Fathers is one which is firmly held and understood by them as being the foundation of their conception of human nature in society.

One of the most representative passages in the literature of the ninth century dealing with this subject is to be found in Jonas of Orleans' treatise for the instruction of the layman. He warns his readers lest they should mistake the differences of worldly dignity and wealth for a real difference in nature. Human nature always remains equal in its character, whatever may be the difference of wealth or education. It is only a foolish and impious pride which causes men to forget these things. Jonas justifies himself in this view by quoting the famous phrase of St Gregory the Great, "*Omnes namque homines natura aequales sumus*," and urges masters to treat their slaves with some humanity, quoting from St Paul, and from a sermon attributed to St Augustine, in which he dwells on the brotherhood of Christian men by grace.¹ The same sentiments are to be found in another treatise of Jonas, "*De Institutione Regia*," in which he admonishes the king to appoint such officers as will always remember that the people of Christ over whom they are placed are by nature equal to them.¹

We find another careful statement and exposition of this conception of the equality of human nature in the writings of Agobard, Archbishop of Lyons. In a letter or short treatise on the baptism of those who were slaves of Jews he protests strongly against some regulations of the Emperor Lewis the Pious, which, as Agobard understood, would have prevented the baptism of such slaves without the consent of their masters, and he

does this on the ground that all men are of one race, one descent, one condition? But we shall come back to this passage in dealing with the question of slavery.

Hrabanus Maurus, again, quotes St Gregory the Great, *Moralia*, xxi. 15, in his *Commentary on the Book of Genesis*,³ and Hincmar of Rheims quotes the same passage, and also *Moralia*, xxvi. 26, which expresses much the same sentiments.⁴

It is interesting to observe that the conviction of the inalienable natural equality of human nature has even found a place in the technical legal documents of the time. In the preface to a collection of capitularies issued by the Emperor Lewis the Pious, it is interesting to read a formal recognition by the emperor of his equality in condition with other men,¹ and in a collection made from the canons of various councils we have the same sentiment expressed at greater length and in more detail, and Christian men, whether lay or clerical, are warned to behave towards those who are their inferiors with mercy, for they should remember that they are their brethren, and have one Father, that is, God, and one Mother, that is, the Holy Church.²

The theory of human equality is treated most fully in relation to the institution of slavery. In the ninth century we find again that apparently paradoxical combination of a theory of equality with an almost universal acquiescence in the institution of slavery. The explanation is the same in this case as that which we have already considered in the Fathers, namely, that slavery is a disciplinary check upon the licence and disorder of sinful men. There is one writer, indeed, the author of the 'Via Regia,' Smaragdus, the abbot of St Michael in the diocese of Verdun, whose attitude to the institution may be different; but it will be best to leave him till we have considered the general position of the ninth century.

Human nature is recognised by all the writers who refer to the matter as being equal. We have already quoted

a passage from Jonas of Orleans¹ which illustrates this, and we may now consider that passage from Agobard of Lyons to which we before referred. In this passage Agobard expresses very clearly both the principle of the equality of the origin and condition of the human race and the justification of slavery as being caused by sin, God is the creator of all mankind, having formed the first man and woman, and from them all men are descended: it is in consequence of men's sins and of the secret judgment of God that some men are exalted and others placed under the yoke of slavery. But while God has thus ordered that men should serve each other with their bodies, He does not allow the inner man to be subject to any one but Himself. The inner man is free.² It is for this reason that Agobard protests so strongly against the prohibition of the baptism of slaves without the consent of their masters. Men, that is, are by nature equal, and this equality continues in the soul of man, whatever may be his external condition. Agobard reproduces the view of the Fathers with hardly any change. Slavery is not, as we might say, natural, but is an institution adapted to the actual condition of human nature.³

Alcuin and Hrabanus Maurus contrast the primitive domination of man over the irrational animals with the later rule of man over man, and trace slavery either to iniquity or adversity, and cite the legal explanation of the condition of the slave, *servus*, as that of one who might have been slain, but has been spared (*servatus*).¹ It is necessary to observe that Hrabanus Maurus

in this passage also gives an explanation of slavery, which is obviously related to the Aristotelian theory, that slavery is the natural and justifiable result of the superiority of

some men in reason over others. It will perhaps be remembered that in Cicero¹ there are traces of the survival of this theory alongside of the doctrine of natural equality.

Hrabanus recognises, indeed, that the actual facts of slavery are not always in accordance with this rational order, and exhorts the pious to submit in view of the rationally ordered and eternal felicity which awaits them. The two views are not wholly inconsistent with each other, the natural and fundamental equality does not exclude differences of capacity and intelligence. But this is not the usual line of thought of the Fathers or the ninth-century writers. It may be well to compare this with the parallel theory of a natural hierarchy of order in government, stated by St Gregory the Great,² while in his general view government, or at least coercive government, is a consequence of sin.

Slavery, then, is just and lawful under the actual conditions of human nature. But this does not adequately represent the sanction given by the Church of the ninth century to the institution of slavery. A letter of Hrabanus to a certain Reginbaldus shows us that it was maintained that it was an irreligious as well as unlawful thing for a slave to attempt to escape from his master. Reginbaldus had asked Hrabanus whether it was lawful to say mass for a slave who died while escaping from his master. Hrabanus replies that he does not find any reason against this, and orders prayers for the slave unless he has committed some other crime. At the same time he admits that it is a grave sin to fly from one's master. He quotes the canon of the Council of Gangrae in which those who teach slaves to despise their masters and to fly from them are anathematised, and admits that he must be still more deserving of anathema who actually escapes from his master. But he also urges that the degree of the sin depends upon the reason of his flight, whether it is due to mere pride or to the cruelty of his master. The fugitive slave should be exhorted to return to his master, as Hagar did to Sarah, and Onesimus to Philemon.¹ We have already dealt with this canon² of Gangrae in our discussion of the Patristic theory of slavery, and it may be said in explanation of it that, considering the fact that the Church gave its sanction to the institution of slavery as a disciplinary institution, such a condemnation of those who incited slaves to fly was at least logically proper. But the letter of Hrabanus seems to indicate the presence among Christian men in the ninth century of a much harsher view. The question of Piegibaldus clearly shows that it was held by some Christians that a slave who fled from his master was guilty of a mortal sin, and Hrabanus's answer makes it plain that though he thought that the precise degree or quality of the sin depended upon the motive prompting the slave's escape, yet such an attempt was in itself sinful.

We may again find illustrations of the ecclesiastical view of slavery in the legislation of the Church as well as of the State with regard to the qualifications of those who were to be admitted to ordination. We could quote a series of enactments from the Council of Frankfurt in 794 to the Council of Tribur in 895 by which the ordination of a slave is prohibited except with the consent of his master.¹

The Council of Frankfurt requires the permission of the master,² but does not say whether the slave must be emancipated, but in all the other passages we cite it is laid down that the slave should only be ordained when he has been handed over by his master to the bishops to be free for the rest of his life, and in one passage the master is warned that he will then lose all rights over the slave.³ It is perhaps worth noticing, also, that in a letter or precept of Lewis the Pious the slave thus emancipated is warned that in the

event of his sinning against the sacred orders which he has received, he will be obliged to return to his former slavery.⁴

According to one set of regulations, if a slave procures his ordination by fraud he is to be handed over to his master, or if he was ordained in ignorance of the fact that he was a slave, he may be retained in his office if his master consents, or his master may reclaim him as a slave.⁵

It is perhaps deserving of notice that we find it alleged as a reason for such regulations, that it is improper that the service of God should be conducted by men of ignoble position. We have an excellent commentary on such a view in the very interesting account which Jonas of Orleans and Agobard of Lyons give of the common attitude of the wealthy and noble persons of their time towards the inferior clergy. Their observations illustrate what seems to have been a real difficulty of the time—a difficulty which alone would have compelled the Church to enforce very strict rules about the condition of those who were to be admitted to orders. Jonas of Orleans gives us a very gloomy picture of the social condition of many of the clergy. They were often employed by wealthy laymen as their stewards, and were considered unfit to be their companions at table.¹ Agobard is equally gloomy, and even more vivid, in his picture. All great men, he says, have a domestic priest, not that they may obey him, but simply that he may be useful to them in performing religious services and in discharging any secular function to suit their convenience. When they want a domestic chaplain, he says, they bring to the bishop some slave whom they have brought up in their house or bought, and demand his ordination.²

The Church of the ninth century acquiesced in the existence of slavery, and adapted its own legislation to this. It is well, however, also to observe that the influence of the Church seems still, as in the period of the later Empire, to tend towards a mitigation of the condition of slavery. The Church still continued to impose its own penalties upon those who killed the slave. We find a Council of Maintz in 847 A.D. renewing the canons of the Councils of Agde and of Elliberis, which imposed the penalty of excommunication for certain periods upon those who killed their slaves intentionally or by accident.¹ We have already considered that passage from the writings of Jonas of Orleans in which he protests against the harsh treatment of slaves.² It is also interesting to find in the “*Edictum Pistense*” of 864 a revival of a regulation contained in a novel of Valentinian, by which those who sold themselves or their children, because of their great poverty or in time of famine, could be redeemed at a price slightly higher than that for which they had sold themselves or their children.⁸

There is, as we have said, one writer in the ninth century who goes beyond this in his attitude to slavery, and who may even desire its abolition. This writer, Smaragdus, is the author of a little treatise or handbook, the ‘*Via Regia*,’ on the character and duty of the good king. We shall have occasion to refer to him again in connection with the theory of the royal power, though there is in this portion of his work little that is very different from other treatises.

With regard to slavery the position of the treatise is different. The author quotes a passage from Ecclesiasticus, which enjoins that a slave should be treated as one’s own soul, as a brother,¹ and entreats the king to forbid the making of slaves in the kingdom—that is, we suppose, he desires to prevent any of the subjects of the king from being enslaved by their fellowsubjects. Then, after quoting a number of passages from the canonical and apocryphal Scriptures of the Old Testament, on the subject of slavery, he

urges that the Christian man should set his slaves at liberty, considering that it is not nature but sin that subjected men to each other, seeing that we were all created equal. He concludes by urging the king to honour God with his riches and slaves, by giving alms of the former and by setting the latter at liberty.²

We think that the author of the treatise feels that there is something unchristian in the slavery at least of Christian men, and that he would like to see this ended. He does not, indeed, actually ask the king to abolish the institution, though he does ask him to forbid the enslavement of any of his subjects; but he does look upon it as being the true mode of honouring God, to set the slave at liberty. It is certainly interesting to find this view held in the ninth century, but we must not make any mistake: this view is hardly the normal one; the premisses of Smaragdus are the same as those of the other ninth-century writers, but the conclusions deduced by him from them are different. The theory of slavery in the ninth century is the same as that of the Fathers: slavery is not natural or primitive, but is a just punishment of man's sin, and a remedial discipline by which his vicious inclinations may be restrained.

CHAPTER XVII.

THE DIVINE AUTHORITY OF THE KING.

WE have seen that the ninth-century writers maintain the tradition of the natural equality of human nature—an equality which, in a certain sense, is permanent and inalienable; but we have seen that this is not inconsistent with their maintaining that slavery is a necessary and wholesome discipline. It is so also with government; in one sense it might seem that this is incompatible with the theory of the natural equality of man, but these writers look upon it as a necessary discipline by means of which life is preserved and order is maintained. The State is a divine institution; its coercive discipline may indeed be a consequence of the Fall, but it is the divine remedy for the Fall, and as such it must be respected and obeyed by all men. We have seen that in some of the Fathers this conception is developed into a theory that the person and authority of the ruler is so sacred that disobedience to him or resistance to his commands is equivalent to disobedience and resistance to God Himself. By some of the Fathers the divine authority of the State is transferred whole and entire to the particular ruler.

This view is in the ninth century formally held by many, perhaps indeed by all writers. But the actual conditions of the political life of the time often came into conflict with this view, and while the writers of the time may have continued to maintain it in form, they were in fact often compelled to adopt quite another attitude towards the head of the State. We also begin to find in them the influence of a tradition which does not descend from the ancient world. The ninth-century writers are for the most part ecclesiastics,

but they are also, at least in Northern Europe, men of the Teutonic tradition. And the Teutonic tradition of the authority of the king is not the same as that of the Latin Fathers.

The conflict of these ideas is the cause of much apparent incoherence and inconsistency: we find the same man speaking at one time as though the divine authority of the king could never be resisted, at another time as if his authority were limited and restricted. The difficulty also of defining the limits of the authority of the ecclesiastical and the civil powers produced a constant friction, which tended to destroy any unqualified theory of the absolute authority of the State.

We find but little speculation or theory as to the beginnings of society and the State, and what little there is, is obviously second-hand and borrowed from earlier writers. In a treatise attributed to Alcuin, ‘*De Rhetorica et Virtutibus*,’ there is an interesting passage on the primitive conditions of human life, drawn, as the author says, from ancient sources, in which man is represented as having originally lived like the beasts, wandering about in the fields, without any rational or moral principle or rule of life. A great and wise man at last appears, and, recognising the qualities and capacities of human nature, gathers men together into one place, and thus brings them to live a peaceable and humane life.¹

We find a very similar account of the primitive condition of man in Hrabanus Maurus’s ‘*De Universo*,’ taken from St Isidore of Seville. Under the definition of “oppidum” he tells us that in the earliest times men were naked and unarmed and had no protection against the wild beasts, no shelter against the heat or cold, no safety against each other. As time went on they learned to make houses in which they could dwell in safety, and in this way towns began to spring up.¹

We can scarcely find any conclusions on such scanty and incidental references to the beginnings of society; it is evident that both the author of the ‘*De Rhetorica*’ and Hrabanus Maurus are simply writing down fragments of ancient descriptions of society, which they accept, but upon which they are not reasoning. In themselves these statements are both too vague and too commonplace to enable us to fix very definitely the philosophic tradition to which we might say they belong. We can hardly go further than this, that they represent a tradition which held that behind the period of the organised society of men there lay a time when there was no fixed order among mankind. It is a state of nature, but not, so far as these passages go, a good or ideal state, but rather one of disorder and misery. It would agree well enough with the conditions of human life, as they might be pictured after sin and vice had come into the world, and before the great institutions, by which sin is controlled and checked, had been developed.

We have seen that the ninth-century writers maintain the primitive or natural equality of men; but they recognise that the actual conditions of life demand government, as they justify slavery. This is well expressed in a treatise of Hincmar of Rheims. God has set diverse orders in the world, as is shown by the apostolic exhortation to obey kings and rulers for God’s sake; for although, as St Gregory says, nature brought forth all men equal, sin has put some below others, and this by God’s dispensation, who has ordained that one man should be ruled by another.¹ Indeed the writers of the ninth century reproduce the strongest phrases of the Fathers with reference to the divine nature of the civil power. In the middle of the century we find this enunciated with great force in the ‘*Capitula Pistensia*.’ These lament the disturbances and discord in the kingdom, and complain that some men will not endure subjection to the king. They forget that, as St Paul says, all power is from God, and that he who resists the power resists the ordinance of God. God is indeed the true King of kings and Lord of lords, but He has ordained that the ruler is to be a true king and lord in God’s place (*vice sua*) on the earth. The devil fell from heaven because he would not accept his subjection to his Creator; and so he who will not recognise the power ordained by God in the world, makes himself the servant of the devil and the enemy of God.²

These phrases can be paralleled over and over again in the Capitularies¹ and in the writers of the time,—Smaragdus, Sedulius Scotus, Jonas of Orleans, Hrabanus Maurus,

Hincmar of Rheims, Cathulfus.² They represent the accepted view that temporal authority is derived from God, and that all men must obey the authority for the sake of God.

It is this conception which is embodied in the phrases used by Charles the Great and his successors: “Karolus gratia Dei rex”; “Karolus serenissimus augustus, a Deo coronatus magnus pacificus imperator, Romanum gubernans imperium, qui et per misericordiam Dei Rex Francorum atque Longobardorum”; “Hludowicus, divina ordinante providentia imperator augustus”; “Hludowicus di vino nutu coronatus.”³ These phrases serve to express the conception that it is God who is the ultimate source of all authority. This is also, we venture to think, the conception which was ultimately conceived to be expressed in the consecration of the king or emperor at his coronation. We shall have a good deal to say about this later, for the mediæval interpretations of the rite and of the part taken in it by the clergy are of considerable importance. For the present it is enough to observe that the introduction of a religious element into the solemn appointment of a king or emperor, while at first it probably meant little more than that the blessing of God was being invoked upon the monarch, was very soon taken to be symbolical of the fact that it is from God that authority came.⁴

The writers of the ninth century, then, maintain the tradition of the Fathers, that the State is a religious institution, that the authority of the civil government is sacred, and that all Christian men should obey it, as representing the authority of God Himself. But they go much further than this. We have just considered a passage from the ‘Capitula Pistensia,’ and we must now observe that the king is here spoken of as standing in God’s place (*vice sua*) in the world. Smaragdus uses an almost exactly similar phrase when he speaks of the king acting “*pro vice Christi*.”¹ Sedulius Scotus calls the king the “Vicar of God.”² It is true that Sedulius calls him God’s vicar in the government of the Church, a statement which we shall have to consider again in connection with the relations of the ecclesiastical and civil powers,—but probably he includes the State in the Church.

A writer called Cathulfus, of whom little is known, and who is represented in literature only by a letter or short treatise, addressed to Charles the Great, uses a similar phrase. He bids the king remember God always with fear and love, for he stands in His place over all His members, to guard them and reign over them. The bishop is said to stand in the second place, to represent Christ.³ Our readers may remember that the writer known as Ambrosiaster expresses a similar thought when he says that the king, whom he calls the Vicar of God, has the “image of God,” and the bishop has the “image of Christ.”⁴ Whether Cathulfus draws the phrase from Ambrosiaster we cannot tell,—it is at least possible that it is from him that the phrases which speak of the king acting in God’s place come; but it is also possible that this method of speaking was traditional among Christians, though it has not come down to us in any patristic writer of the West, except Ambrosiaster. It is important to observe the phrase the “Vicar of God.” We shall presently have to consider its meaning in these writers in relation to the Church: in a later volume we shall see that it came to mean a great deal in the controversy between Church and State. It is significant for us for the moment as representing in the most terse form the universal judgment of the time that the king is the representative of God,—that it is from God that he draws his authority.

The king thus stands in God’s place, is His representative on earth, and the writers of the ninth century use very strong phrases to express their condemnation of rebellion

against his authority. The Council of Mainz in 847 inserts in its decrees a very strong condemnation of conspiracy and rebellion against the lawful authorities in Church and State, and threatens those guilty of such acts with excommunication.¹ Some of the manuscripts which contain the documents of this council say that these sentences come from an epistle of Hrabanus Maurus. In one of his letters, written some years earlier, he speaks very strongly on the wickedness of revolt, and enforces this by a number of quotations from the Old and New Testaments, citing especially the conduct of David, who would not raise his hand against the Lord's anointed, and recounting the judgments that overtook several of those who in later times rose in insurrection against their legitimate lords.¹

Hincmar of Rheims uses equally strong phrases on the necessity of obedience. In his treatise, 'De Fide Carolo Rege Servanda,' he also cites the example of David's conduct towards Saul as the true model of right conduct,² and then quotes those very strong words of St Gregory the Great on which we commented in a former chapter, in which he warns subjects that if they transgress against their rulers, they transgress against God, who set them over men.³ In one of his letters he speaks more directly and strongly still. Nothing, he says, is done in the world except by God, or by His just permission. When kings, therefore, reign by God's appointment (*ex illo*) it is the work of God's mercy, that their people may be safe. When they rule, not by his appointment (*non ex illo*), but by His permission, it is God's punishment on a sinful people. The true believers do not resist the power, which is either given or permitted by God, but, humbling themselves under God's hand, give thanks to Him

for good princes, and rejoice even while they groan under those who are permitted by God to reign for their chastisement. They do indeed resist wicked works and commands, but they endure patiently, for God's sake, the evils which are brought upon them by wicked princes.¹ This passage is the more noticeable that the general purpose of the letter is to protest against infractions of the privileges of the clergy by the king.

These passages will be sufficient to show how strongly the doctrine of the divine authority of the civil government, and the duty of obedience to it, was held in the ninth century. It might seem as though these writers were still wholly under the influence of the extreme position of St Gregory the Great. We can indeed understand how they came to this view. God is the source of all authority; the king as ruler derives his power from God, the evil king as much as the good; the former indeed, as we have seen, in the last passage quoted from Hincmar, holds his power by God's permission rather than by His appointment, but still he holds it by God's permission for the chastisement and correction of evil. Therefore, they say, we must always obey the king, and submit to him, even when unreasonable and unjust, lest we should be found to be resisting God. These writers think that their principles are the same as those of Gregory the Great. We must now consider other aspects of their theory of government, and we shall be led to recognise that while they repeat these patristic phrases with sincerity, their own final judgment is influenced also by considerations of quite another kind.

CHAPTER XVIII.

THE THEORY OF THE KING AND JUSTICE.

So far as we have gone in our examination of the political theory of the writers of the ninth century, we have recognised the influence of the theories of St Gregory the Great as to the duty of an unlimited obedience to the civil ruler; for in the main it is his sentiments

and phrases which they are reproducing. No doubt they reproduce these with honesty and sincerity; no doubt they imagined that they really held just the same opinions as St Gregory. But when we examine their writings further, we discover at once that we have here only one aspect of their view of the nature and source of the authority of government.

The truth is, that while the writers of the ninth century are most anxious to express themselves in the language of the Fathers, most anxious to be faithful to the traditions which they had inherited from them, their own standpoint is really in many ways a very different one from that of St Gregory the Great. The situation of the ninth century was, in fact, a very different one from that of the sixth century. The whole Western Church must probably have been influenced by the violent rupture between the Bishop of Rome and the iconoclastic emperors. Italy had risen in revolt against the attempt to suppress the use of images, and the Bishops of Rome, though they had tried to moderate the violence of the revolt,¹ yet had necessarily been compelled by their own convictions to approve the Italian resistance to the impious wishes of the iconoclastic emperors; and such armed resistance must have tended to neutralise the tradition of St Gregory the Great. The transference of the empire from the Byzantine to the Frank, and the fact that the Western ecclesiastics had in the ninth century to do, not with the civilised chiefs of the ancient Roman civilisation, but with the half-barbarous Teutonic kings and emperors, must have exercised an even greater influence upon the temper of the great churchmen. They might express themselves in the most deferential terms to their rulers, but actually they were civilised men,—at least they had the tradition of civilisation,—while the rulers were for the most part uneducated and half-barbarous. It must have become very difficult for the churchmen to think of an unqualified obedience to men who in some very important matters were their inferiors. And there was yet a third circumstance which profoundly affected the political conceptions of churchmen and laymen alike. They might, as Christians, desire to be faithful to the traditions of the Christian Fathers, like Gregory the Great, but actually and necessarily they were still more powerfully influenced by the traditions of their own race. We shall have to examine the Teutonic tradition of Government presently in more detail: for the moment it is enough to say that the Teutonic tradition knew nothing of an unlimited authority in the ruler, but a great deal of the relation of the king to his great or wise men, and even to the nation as a whole; and for the most part the churchmen outside of Italy, and even to a large extent in Italy, were men of the Teutonic race or tradition.

The situation of the ninth century was wholly different from that of the sixth; and while, as we have seen, the writers of the ninth century, in their anxiety to be faithful to the tradition of the earlier Christian writers, constantly repeat such phrases as these of St Gregory the Great, they are also continually and quite clearly governed by other traditions and give expression to other principles. In this and the following chapters we have to consider these. We begin by examining their conceptions of the relation of government and justice. We have seen that the writers of the ninth century look upon the king as the representative of God, and sometimes speak as though this were true, whether he is good or bad, just or unjust. This does not, however, mean that they are blind to the difference between the just king and the unjust, whom they do not hesitate to call a tyrant. It is true that some of the Fathers had spoken as though this made no difference in the duty of the subject, and we

have seen that St Augustine actually omits the characteristic of justice from his definition of the State; but, as we have also seen, other Fathers represent another tendency, and the influence of one of these is very strong in the ninth century.

We have in a previous chapter mentioned the definitions of *divitas* and *populus* given by St Isidore of Seville. Hrabanus Maurus reproduces them,¹ and it is perhaps worth noticing that in doing this he follows St Isidore in his reproduction of Cicero's definition of the State as against St Augustine. We cannot, indeed, argue from this that he intends to repudiate St Augustine's definition; but the fact may serve to illustrate what we have already said, that St Augustine's definition of the State does not seem to have exercised any considerable influence in the Middle Ages.

We have also in a previous chapter mentioned the definition of the king given by St Isidore of Seville. Kings, he says, are so called from ruling, but he does not rule who does not correct: if the ruler acts rightly, he will keep the name of king; if he transgresses, he will lose it. There is an ancient proverb, "Thou shalt be king, if thou doest rightly; if not, thou shalt not be king."² His definition is constantly referred to by the writers of the ninth century. Hrabanus Maurus reproduces it verbatim in his 'De Universo,'³ and it is more or less exactly cited by Sedulius Scotus,⁴ by Jonas of Orleans,⁵ by Cathulfus,⁶ and by Hincmar of Rheims.¹ In itself this definition might mean much or little, but it obtains a very considerable significance when we observe again how sharply the "king" is contrasted with the "tyrant." St Isidore, in the same place where he defines the meaning of "king," also defines the meaning of "tyrant." This name, he says, had formerly been used as equivalent to that of king, but in later time was used to denote a wicked and cruel ruler.² This definition, again, is reproduced exactly by Hrabanus Maurus,⁸ less precisely by Jonas of Orleans;⁴ and Hincmar of Rheims seems to have it in his mind when he says that without clemency, patience, and love a man may become a tyrant, but cannot well attain to the kingdom.⁵ St Isidore of Seville adds to his definition of the king the observation that the principal royal virtues are *justitia* and *pittas*? Hrabanus Maurus⁷ and Hincmar of Rheims reproduce his phrase.⁸

The ninth-century writers are also strongly influenced by a work of uncertain date, which some of them seem to have regarded as being by St Cyprian, though it was also at various times attributed to Origen, St Augustine, or other Fathers. It seems clear that the work is of a much later time than any of these, and it has been contended that it belongs to the

seventh century.¹ This treatise, 'De Duodecim Abusivis Saeculi,' which is of much value and interest throughout as a criticism of the condition of society in the period, whatever that may precisely be, to which it belongs, has one chapter which is specially important in relation to the conception of justice in the State. The ninth chapter deals with the unjust king, and declares that the king must not be unjust, but must restrain the unjust: it is the proper purpose of his office to rule, but how can he rule and correct others unless he first corrects himself? Justice in the king means to oppress no man unjustly, to judge righteously between men, to defend the weak, to punish the wicked, to protect the Church, to put just rulers over the kingdom, to live in God and the Catholic faith, and to keep his children from evil. The king who does not rule according to these principles will bring many evils and disasters on his country and his descendants. The king should remember that as he has the greatest station among men, so also he will suffer the greatest punishment if he does not do justice.² This chapter is quoted

by Jonas of Orleans¹ and by Hincmar of Rheims² in their treatises dealing with the nature of the royal authority.

The formal treatises on kingship in the ninth century are indeed very largely made up of admonitions to the king to follow after justice and mercy, to seek wisdom and to fear God. Smaragdus bids the king to love justice and judgment, the royal way trodden in older times by former kings. He admonishes him to do justice to the poor and the orphan, if he desire that God should establish his throne.³ Alcuin in his letters continually urges upon the various rulers to whom these are addressed the same principle, that their chief duty is to do justice and mercy to their people.⁴ Sedulius Scotus, in his treatise on the nature of the Christian ruler, lays much stress on the same points.⁶ He and Cathulfus have a very interesting enumeration of the eight qualities which are the most firm supports of a just king.¹ Jonas of Orleans, as we have already mentioned, cites St Isidore's definition of the king and the tyrant, and also the ninth chapter of the treatise 'De Duodecim Abusivis Saculi,' and himself urges with much vigour on the king the duty of doing justice. The king's chief duty, he says, is to govern the people of God with equity and justice, and to strive that they may have peace and concord. He is to prevent all injustice and to appoint fit persons to administer the State under him, for he will be responsible if they are unjust. Such ministers must learn that the people of Christ are by nature their equals, and that they must rule them justly, and not lord it over them or ill-treat them, thinking that they belong to them, or are put under them for the glory of the rulers. Such notions belong to tyranny and unjust power, and not to justice.²

In another passage of the same treatise Jonas urges that justice preserves a kingdom, while injustice causes its ruin ;¹ and he prefixes to another chapter, in which he urges on subjects the religious obligations of obedience to the king, the observation that the duty of the royal office is to care for the wellbeing of the subjects, and that therefore, as they desire that the king should aid them, they should obey and serve him.⁸ Hincmar of Rheims, as we have already seen, cites St Isidore's definition of the king and the tyrant, and the treatise 'De Duodecim Abusivis Saeculi' on the unjust king, and he repeats Jonas of Orleans' observations on the duty of kings' ministers.⁸

We find Jonas' statement of the nature of the true king and of his chief duties reproduced in the address presented by the bishops to Lewis the Pious in the year 829. In this they first cite passages from the writings of St Isidore of Seville, St Gregory the Great, and Fulgentius of Ruspe, to illustrate the difference between the tyrant and the king, and the true character of the king, and then urge upon him to remember that his chief duty is to govern with equity and justice, to defend Churches and the servants of God, the widows, orphans, and all other poor and needy people. His duty is to prevent all injustice, if possible, and if it does occur, to put it down. He should therefore be always ready himself to hear the cause of the poor, lest any of his ministers should act unjustly, or suffer the poor to be oppressed. Men of every rank must remember that if they will have to answer for every idle word, much more will they have to give account to God for the office which He has intrusted to them.¹

Hincmar of Rheims and Sedulius Scotus seem to express these conceptions in stronger terms than any others. Hincmar quotes, without comment indeed, but no great comment was

needed by him, a phrase of St Augustine's to which we have referred in an earlier chapter: "Remota itaque justitia, quid sint regna nisi magna latrocinia." ¹ And Sedulius

Scotus, warning evil rulers of the ruin which impends over them, of the judgment of God which awaits them both in this world and the next, exclaims: "What are impious kings but the greater robbers of the earth, fierce as lions, ravening like wolves; but they are great to-day and perish to-morrow, and of them God has said, 'They reigned, but not by Me; they arose as princes, but I knew it not.'"* The evil ruler or tyrant is no true king; he is only, as Cicero indeed had called him, a wild beast, the most terrible and loathsome known to the world.

The writers of the ninth century, then, while they reproduce the phrases of St Gregory the Great with regard to the divine authority of the ruler, and speak at times as though he must under all circumstances be obeyed as the representative of God, are also clearly and strongly influenced by other considerations, partly founded, no doubt, upon the authority of other Fathers like St Isidore of Seville, but also in large measure related to their own experience and traditions. They no doubt felt really and profoundly the truth which lay behind St Gregory's phrases, the truth that authority in the State is sacred; they had ample experience of the consequences of discord and civil strife. But, on the other hand, they had no mind to submit to injustice or tyranny; they were probably clearly enough conscious of the fact that many of the kings whom they had known were capricious and fallible rulers.

We must turn to the actual conditions of the government of the time, not to discuss the intricacies of the Frankish or other Teutonic constitutions, but that we may recognise some of the principles which lay behind the constitutional machinery and practice of those times, and that we may more completely understand the forces which were moulding the theory of the State.

CHAPTER XIX.

THE KING AND THE LAW.

WE have seen that the writers of the ninth century look upon justice as something essential to the character of the true ruler. Without justice he is a tyrant and no king. The conception of justice was indeed no more clear in the ninth century than in the present day, or in ancient times; but we think that justice, relatively to the ruler, had a meaning in the ninth century whose importance is very great indeed. No king is just who does not observe and respect the law; the law is at least one standard of justice, clear, distinct, constantly appealed to.

We have seen in earlier chapters that in the theory of the Roman jurists the emperor is the source of law. Justinian even speaks of him as the sole "legis lator."¹ It is true that, as we have also seen, this power is his only because the Roman people have chosen to confer their authority upon him; the people is the only ultimate source of law. But still the emperor is the actual source of law. And the emperor is "legibus solutus," a phrase whose significance it is not easy to define. It may indeed be doubted whether it can be clearly defined. Perhaps it only expresses a conception whose history can be traced in such a constitutional form as that of the dispensing power of the English Crown,—a power which seems to represent the consciousness present, however vaguely, to any more developed reflection upon law and the State, that there must be a power in the State itself which can, if necessary, interfere to prevent the harsh or inequitable operation of the law in particular cases;

a power which, being in its nature administrative rather than legislative, must be intrusted to the head of the State as administrator. It is the influence, perhaps, partly of

this consciousness, partly of the revived study of the Roman jurisprudence, which leads the more systematic political thinkers of the thirteenth century like St Thomas Aquinas to observe that the prince cannot properly be said to be under the law, for he must have the power of dispensing with it.¹

In the ninth century, however, the king is not the sole source of law, but only has his part in the national relation to it, and he is not usually thought of as above the law, or outside of it, but as bound to carry it out. The ninth-century theory of the relation of the king to justice may be reasonably connected with the theory of his relation to law. Lothair, Lewis, and Charles, at their meeting at Mersen in 851, put out a declaration promising their faithful subjects that for the future they would not condemn, or dishonour, or oppress any man against the law and justice.² And when Lewis at Coblenz in 860 repeats the promises of Mersen, he adds an emphatic assurance that his faithful subjects shall enjoy the ancient law, and that all shall receive justice and law.³ Justice, when translated into constitutional tradition, means, in the first place, the observation of the national law: the king is just when he sees that this is carried out, unjust when he acts in contradiction to it.

In the treatise of Hincmar of Rheims on the divorce of Lothair and Tetburga we find a formal discussion of the nature and source of the royal authority, to which we shall have to return later, for it contains much which is important. For the moment we look at it only to see how he deals with the relation of the king to law. It is contended, he says, by some wise men that the prince is a king, and that the king is subject to the laws and judgment of none save God alone. This is true in one sense, he replies—that is, if he is a true king, for the king is so called from ruling; and if he governs himself according to God's will, and directs the good into the right way, and corrects the wicked so as to drive them from the evil way to the good and right one, then he is a king indeed, and subject to the laws and judgments of none save God. Whosoever, then, is a king in the true sense, is not subject to law, for law is set not for the just but for the unjust, for wicked men and for sinners; and he who rules himself and others according to the fruits of the spirit is not subject to law, for "against such there is no law." But the adulterer, murderer, unjust man, the ravisher, and the man guilty of other vices, whoever he may be, will be judged by the priest.¹ Hincmar's treatment of the question seems to indicate that he was in some measure conscious of the difficulty of defining in precise terms the relation of the king to law; but it is fairly explicit as indicating that whatever might be the relation of the true ruler to the law which he is justly administering, the evil ruler who sets at nought the moral law is liable to correction at least by the Church. We shall have to return to this particular aspect of the question later.

If in this passage Hincmar seems to express himself in the most cautious fashion, we find him speaking in more unqualified terms in other places on the principle that it is the duty of the ruler to observe and obey the law. In another part of the same treatise he quotes a phrase of St Ambrose which we have already discussed, "*Leges enim imperator fert, quas primus ipse custodiat*," and warns the king that if he breaks the laws he may find himself condemned by the apostle's words, "*Thou that preachest a man should not steal, dost thou steal?*"¹ We have considered the meaning which may be attached to this phrase as it is used by St Ambrose; Hincmar of Rheims' comment on it makes it fairly clear that he understands it in a somewhat strict sense. Hincmar also quotes the passage

from St Augustine's treatise 'De Vera Religione' which we have already discussed: the citation occurs as part of a discussion of the action of Charles the Bald in summoning Hincmar, Bishop of Laon, to appear before a secular court, and passing some sort of judgment on him in his absence. Hincmar argues that this action is contrary not only to the canons, but also to laws of the emperors from Constantine downwards, and to the promises made by Charles himself to observe the canons. Therefore he concludes, in a phrase of St Gregory the Great, "It must be so, that whatever is contrary to the laws has no force," and then quotes St Augustine as saying that when men make laws they judge what is good, but when they have once been made, the magistrate cannot judge the laws, but can only act in accordance

with them.¹ It is clear that Hincmar uses St Augustine's phrase to confirm his opinion that the king cannot violate the laws which had long been in force as to the relation of the ecclesiastical and secular courts. In the 'De Regis Persona' Hincmar quotes the first part of the same saying of St Augustine, and then concludes that just laws which have been promulgated must be enforced by the prince.²

But the strongest and most noteworthy statement of the same view is to be found in Hincmar's treatise called 'De Ordine Palatii.' In the eighth chapter of this work we have an exceedingly important statement of the writer's conception of the relation of the king to the law, and of the source of the authority of the latter. He begins by a reference to the rule that no priest must be ignorant of the canons, and then proceeds to say that in like manner the sacred laws—that is, the Roman laws in the 'Lex Romana Visigothorum'—decree that no one may be ignorant of the law or despise its decrees. This includes persons of every worldly rank. Kings, therefore, and the ministers of the commonwealth, have laws by which they must rule the inhabitants of every province; they have the capitularies of the Christian kings, their ancestors, which were lawfully promulgated with the universal consent of their faithful subjects. And he then again quotes St Augustine's sentence that men judge the laws when they make them, but when they are once made, the judge cannot judge them, but must act in accordance with them.¹ We cannot here mistake Hincmar's meaning; the king's duty is to govern according to the laws; he is no more entitled than any private person to ignore the law or to violate it. His duty is to carry out the law, not to act contrary to it.

In Hincmar's words we find not only a strong statement of the normal subordination of the prince to the law, but a suggestion of one important cause of this subordination. We think that the words which describe the "capitula" which the king is to carry out, as having been made *generalis consensu fidelium*, are extremely significant, and indicate one of the strongest grounds for Hincmar's judgment that he must keep the law. The law is not merely his law, nor is it merely by his will that it has been made. So far as laws have been made, they proceed from the whole State, they have been made with the general consent of the faithful subjects of the king. It requires but little reflection to observe how far this conception is from that of the Roman jurists. The relation of the Roman emperor to laws when promulgated may be a little obscure, perhaps a little doubtful. Ulpian's "*legibus solutus*,"² and Theodosius' and Valentinian's "*Digna vox maiestate regnantis legibus alligatum se principem profitemur*,"³ may represent two different tendencies of thought, but at least the emperor was normally in his own person the direct source of law. To the ninth-century writers

the king had his part in making law, so far as law is made, but he has only one part out of many. Other voices have been heard besides his, the consent of others has to be given before anything can become the national law. This conception is one of the very greatest importance in the development of mediaeval political thought, and we must proceed to examine the legislation of the ninth century to make ourselves quite clear upon the matter.

We must observe in passing that the legal system of the ninth century has a very different character from that which we should attribute to modern law. The great mass of the law of the early Middle Ages was not, so far as the consciousness of men went, made at all. It was a part of the national or tribal life; it had grown with the tribe, changing, no doubt, but the people or tribe were hardly conscious of the changes. Such traditional law is contained in most of the early mediaeval codes, and its authority was like that of nature. But in the ninth century there was already developed, perhaps prematurely, the conception that law needs deliberate adaptation, or at least addition, and therefore, while much of the legislation of the time is nothing but the formal reiteration of what is supposed to be immemorial custom, other parts of it represent conscious and deliberate attempts to improve or add to the traditional customs of the nation.

There are three bodies of secular law to which the ruler of the Teutonic States was related: first, the traditional tribal law, which varied considerably within such extended dominions as those of the Frankish Empire; secondly, the legislation of the ancient Roman Empire, which obtained in many districts, mainly in the form of different editions of the Theodosian code, a system of laws over which the Frankish king or emperor had little control, which are usually referred to by the writers of this time as the “*leges sacrae*”; and, thirdly, the actual new laws, or additions to old laws, which the king or emperor might issue, but only with the consent and counsel of some or all of his subjects.

The relation of the king or emperor of the ninth century to the secular law is thus very different from that of the Roman emperors of antiquity. We are only repeating the judgment of the great majority of historical scholars, and would refer to the work of Stubbs¹ and Waitz² among the older writers, and to Richter and Kohl⁸ and Viollet⁴ among the more recent. It is true that Fustel de Coulanges has argued with much learning and ingenuity against this view, or at least in favour of a considerable modification of it, but we do not think that he has succeeded in establishing his case. The matter is, however, of such great importance in the history of the development of political theory that we think it well to illustrate it briefly from the legal documents of the ninth century.

We may begin by observing the method of promulgation of a series of “*capitula*,” to be added to the “*leges*,” issued by Charles the Great in the year 803. One manuscript contains an account of the method of promulgating these in Paris. They were sent to Stephen the Count, who was to cause them to be read in the “*mallus publicus*” in the presence of all the “*scabinei*.” When this had been done, and they all agreed that they would for the future observe the laws, the “*scabinei*,” bishops, abbots, and counts, affixed their signatures.⁶ This statement, it is true, only refers to one place, but a comparison with sect. 19 of the “*Capitulare Missorum*” of the same year makes it fairly plain that something like this was the normal mode of promulgating these new laws. We learn that the “*missi*” were to inquire of the “*populus*” about the “*capitula*” which were to be

added to the laws, and to see that, when all had consented, their signature or other authentication was appended to the "capitula."⁸

We can now compare with this the formula with which Charles the Great issues the "Capitulate Aquisgranense." Charles does this with the consent of his bishops, abbots, counts, and all his faithful subjects.¹ We find yet another very noteworthy illustration of this conception of the mode of public administration and legislation in the ' *Ordinatio Imperii* ' of Lewis the Pious in 817, the document which provides for the partition of his dominions between his sons. These regulations are made in a sacred assembly and "generalitas" of the whole people, held after the wonted manner. After a fast of three days his eldest son (Lothair) was elected by Lewis and the whole people to be his colleague in the empire. Then with the common counsel it was decided to give the younger sons, Pippin and Lewis, the title of kings, and to allot to them certain lands by definite "capitula." These were considered and then confirmed by Lewis and all his faithful subjects, so that what was done by all might by all be held inviolable.² (This

last phrase is perhaps specially worthy of notice.) We may compare with these the terms of the "Proemium" to the "Capitularia tarn Ecclesiastica quam Mundana" of 818, 819; sect. 29 of the "Capitulare Ecclesiasticum"; the phrases of the "Cap. Legi Salicse Addita" of 819; and the "Cap. de Functionibus Publicis" of 820.¹

But it is hardly necessary to multiply citations to establish a judgment which is almost universally accepted as to the constitutional theory of the Teutonic States,—namely, that the king does not make laws by his own authority, but requires the consent and advice of his wise men, and, in some more or less vague sense, of the whole nation.² It is this tradition or theory which at last finds something like a formal and explicit definition in the famous phrase of the "Edictum Pistense" of 864, "Quoniam lex consensu populi et constitutione regis fit,"³—a phrase which, no doubt, like so many of the obiter dicta of the Middle Ages, must not be interpreted under the terms of what we consider our clear-cut modern conceptions, but which is full of significance for the development of the theory of law, when it is taken in its proper connection with the general tendencies of the ninth century and of the Teutonic traditions.

This phrase represents the common tradition of the Teutonic States, and we can see no reason to think that the transformation of the Frankish kingdom into the empire made any change whatever in these constitutional conceptions. We see no reason to think that even Charles the Great dreamed of claiming the position of the ancient Roman emperors as the sole legislator. It is true, indeed, that Charles the Great and Pippin issue laws in Italy under another form than that which is customary elsewhere, and that in these there is usually no mention of the council and consent of the great men,¹ but we think that this must be understood as arising out of their position in Lombardy as conquerors.

We think, then, that the political theory of the ninth century regarded the ruler as being bound by the laws of the nation, not as superior to them. The king had his part in making and promulgating law, but others had a part also, and in some vague sense even the whole nation. We think that this is clear, but it is no doubt also true to say that the historical circumstances of the Frankish States in the ninth century probably tended to give this tradition rather more reality than it may have had before, or in other Teutonic States. The history of the century is the history of a perpetual series of revolts and civil wars, and as a result of these the royal authority was certainly dwindling so that as the

century advances we perhaps find a more and more frank assertion of the limited and even conditional nature of the royal authority.

CHAPTER XX.

THE THEORY OF THE SOURCE AND CONDITIONS OF AUTHORITY IN THE STATE.

WE have so far considered the source of the authority of law, and its relation to the king or other ruler. We must now examine the immediate source of the authority of the ruler.

It would be a grave mistake, we think, to conceive of the ninth-century writers as having any such definite theory of the delegation of the popular authority to one man as that which obtained among the Roman Jurists. The theory of the ninth century is much vaguer than this: the divine appointment, the custom of hereditary succession, the election by the great men and the people,—all these elements go to constitute the conception of a legitimate claim to the throne. In a document concerning the election of Charles the Bald to the kingdom of the Eastern Franks in 869 we have a good statement of all the grounds of succession—the right of the legitimate heir, the appointment of God, and the election of the nation.¹

The custom of hereditary succession—that is, of succession within one family—was among the Franks, as generally among the Teutonic tribes, accepted as normal; but it is also true that among the Franks as elsewhere, in order that a succession should be valid, it should be confirmed by some national election or recognition. We are not here concerned with the constitutional question of the organisation of the council of the great men or wise men of the kingdom,—that their election was in some sense considered as the election of the nation will hardly be doubted, we think, by any one. The question in which we are now interested is the fact of the elective character of the monarchy of the ninth century rather than its method.

In order to make the matter clear we think it is desirable to consider certain elections as illustrating this principle. There is, indeed, one instance of the appointment of rulers in the Frankish Empire of the ninth century which might seem at first sight to furnish an example of a strictly personal appointment without the sanction of the nation. This is to be found in the statement of the division of his dominions by Charles the Great in 806. In this he makes no mention of the counsel or consent of any one, but seems to determine all the questions concerning the appointment of his sons as colleagues to himself during his lifetime, and the division of his dominions among them after his death, by his own will and authority.¹ It should, however, be observed that Einhard in his *Annals* for the year 806 relates how this settlement was made by Charles at a meeting of the *primores* and *optimates* of the Franks, and that it was confirmed by the oath of the Frankish *optimates* and sent to Pope Leo to be subscribed by his hand.² It is perhaps also worth noting that even if Charles might be thought to claim the right of nominating his successor, he clearly enough conceives of a return, after his death, to the custom of election. In the fifth clause of the “*Divisio Reg- norum*” he provides that if one of his sons should die leaving a son, he should, if the people elect him, reign in his father’s place.¹ If, however, it should be contended that the relation of the action of Charles the Great to the principle of election is a little ambiguous, there can be no doubt about the matter when we turn to the successors of Charles the Great

We have already considered the settlement of the empire in 817 by Lewis the Pious,² and we need only here draw attention to the very explicit terms in which is expressed the

consent of the whole people to the election of Lothair, the eldest son, as colleague to his father in the empire, and to the elevation of the younger sons to the dignity and title of kings and to authority in the several portions of the empire,³ and to the provision for the election by the people of their successors.⁴

We pass on to the later part of the century, and we find not only that the principle of election is very clearly retained, but that we can trace the gradual development of the custom of stating the conditions on which the elections are made. In the documents concerning the succession of Charles the Bald to the kingdom of Italy in 876 we have a very clear statement of the election by the bishops, abbots, counts, and others, and we have also the record of the mutual promises made by subjects and king to each other. The bishops and counts swear obedience, counsel, help, and fidelity, while Charles swears to give law, justice, honour, and mercy to all.⁶

When Charles the Bald died Lewis the Stammerer finally came to the throne, with the consent of the bishops, the abbots, the primores of the kingdom, and others, and was consecrated and crowned by Hincmar, Archbishop of Rheims.¹ We have the promises which he made at the time, and in these we find both a very frank recognition of the fact that he is appointed king by the mercy of God and the election of the people, and very emphatic assurances that he will observe the ecclesiastical rules and the national laws.¹

We may compare the tone in which Hincmar addresses Lewis III. While protesting his humility, Hincmar says that he may very well say to him (the king) that it was not he who elected Hincmar to his office in the Church, but Hincmar and his colleagues, with the other faithful subjects of God and his forefathers, who elected him to be ruler in the kingdom, on the condition of his keeping the laws.²

If we find such strong pledges of good government given by the kings and emperors of the regular line, we need hardly be surprised to find that these become almost stronger in the case of the election of those who were not so near the direct succession. In the documents concerning the election of Boso to the kingdom of Arles in 879, we find something very like a formal statement of conditions of election. The synod or assembly sends to Boso inquiring whether he will grant law and justice to all his subjects, great and small, and will listen to all intercession, and freely hearken to all good counsel, seeking rather to make himself useful than merely to be chief. Boso replies that he is but little equal to such a charge as that offered, and would have refused it had they not been unanimous, and promises that he will maintain law and justice, and will strive to follow the example of the former good princes, and to maintain equity both to the clergy and to his other faithful men.¹ We feel that this is something like a compact between the ruler about to be elected and his subjects.

This is almost more clearly still expressed in the capitularies of the election of Guido as King of Italy by the bishops met at Pavia in 889. The formal document of the election recalls the disastrous confusions that had followed the death of the Emperor Charles, and then proceeds to state how they have met at Pavia to consider the common welfare of the kingdom, and have elected Guido, inasmuch as the divine aid has enabled him to triumph over his enemies, and inasmuch as he promises to love and honour the holy Roman Church and to obey the ecclesiastical laws, and to maintain their own laws to all his subjects, to put down rapine and establish and maintain peace throughout his kingdom.

They report that for all these and many other indications of his goodwill they have elected him to the kingdom.²

It is, however, not only at the time of the election or appointment of a king that we can see something very like a bargain or agreement between people and ruler. More than once we find the emperors or kings trying to bring back confidence and order by solemn assurances that they will maintain law and justice if their subjects on their side will render them true help and obedience. In 851 Lothair, Lewis, and Charles met at Mersen, and issued a document in which they assure their faithful subjects of all ranks and conditions that they may be fully secure that for the future they will not condemn or dishonour or oppress any one in violation of law and justice or right authority and reason, and that they will, with the common council of their faithful subjects, set forward the restoration of holy Church, and the whole state of the kingdom, in the assurance that their subjects on their part will be faithful and obedient, and true helpers to them, with such counsel and aid as is due from every subject to his prince.¹ This assurance or agreement we find repeated

at Coblenz in 860 in almost identical terms,¹ and again by Charles the Bald in the “*Capitula Pistensia*” of 869.² We have also the form in which these promises were issued after the meeting at Coblenz by Lewis, and it is perhaps worth while looking at this, as it exhibits almost more clearly the character of an agreement or mutual promise.³

In the “*Capitula Pistensia*” of 862 we have another statement of the same principle of mutual obligation. These begin with a very solemn acknowledgment of the faults which have brought the present distress upon the country: the king laments that by his own evil deeds he has driven away

the Holy Spirit, which was given to him by the imposition of hands of the bishops at his consecration. Then there follows a passage, which we have already quoted, on the divine nature and authority of government on earth, and this again is followed by an exhortation to all to strive together for justice; and the capitulary concludes by saying that by common consent it has been decreed to sign this, remembering that as all men of all ranks expect that the king shall maintain their proper and lawful rights, so all men of all ranks must observe the proper and lawful honour and obedience due to the king.¹

We have seen that the principle of the joint action of the king and the nation in making law finds a formal expression in the “*Edictum Pistense*”; we may find a good illustration of the significance of the promises of justice and obedience on the part of kings and subjects in another document of this time, the “*Capitula ad Francos et Aquitanos Missa de Carisiaco*” of 856. A large part of his kingdom was in revolt against Charles the Bald, and these Capitula were drawn up with the view of pacifying the revolt, and present us with a very clear statement of the conception that just as his subjects were bound by certain obligations to the king, so he on his part was bound by very distinct obligations to them: they even speak of these mutual obligations as constituting a pactum. What is more than this, the capitula are drawn in the form of an address from the loyal subjects of Charles to the revolt, and while they urge them to come back to their allegiance, and intimate plainly that they will in the future compel obedience to the just judgments of the king, on the other hand they intimate just as clearly that if the king, “*juxta humanam fragilitatem*,” should do anything contrary to the pactum, they will, reverently and honourably, admonish him of his duty; and they

assure the rebels that if, when he is thus admonished, he should wish to do injustice, the king will be unable to carry out his will.¹ The document exhibits not only the conception of a mutual agreement made, at his election or otherwise, between the king and the people, but also the conception that the subjects have the same right to compel the king to observe his agreement as he has to compel them to observe theirs.

The circumstances of the ninth century tended thus to favour the development of the conception that the ruler holds his place in virtue of the election of the nation, and of his fulfilment of the promises on which that election was based; and there were not wanting in the century circumstances which tended towards the further conclusion, that if the king failed to discharge the obligations which he had undertaken, he might not improperly be deposed. The deposition of the unhappy Lewis the Pious serves to illustrate this tendency, and probably also helped materially to develop it. We cannot here discuss either the general circumstances or the constitutional conditions of the deposition or abdication of Lewis the Pious. But it is for our purpose extremely important to observe the terms in which the deposition of Lewis is alluded to. It was at Compiègne in the year 833 that Lewis was compelled to abdicate, and the bishops, there assembled, published a statement in which they set forth the great faults that Lewis had committed,—how he had neglected his charge, and done many things displeasing to God and men; and they relate how they had exhorted him to repentance, inasmuch as he had been deprived of his earthly power in accordance with the counsel of God and the ecclesiastical authority.¹ In the next chapter we must consider the significance of this reference to the action of the ecclesiastical authority in the deposition of Lewis. In the meanwhile we are only concerned to observe that the bishops look upon the deposition as lawful.

It is in this same sense that Hincmar of Rheims appears to refer to the subject in his treatise on the divorce of Lothair and Tetburga, in a passage to which we have already referred. He is arguing against those who maintained that the king was subject to no laws or judgments, and pointing out that kings like David were rebuked by the prophets, Theodosius by St Ambrose, goes on to say that in his own time the pious Emperor Lewis had been cast down from his kingship, and was restored to it “post satisfactionem” by the bishops with the consent of the people.¹ Hincmar seems to mean that the deposition had been unwise, but he does not suggest that in itself there was anything improper in the action; indeed the general context would suggest that he regarded such action as being under certain circumstances proper and right.

It is true that in that letter or treatise of Hrabanus Maurus which we have already cited, Hrabanus, referring to the deposition of Lewis, speaks very emphatically about the honour due from sons to their parents, and the honour and obedience which all men are to give to the royal authority, and illustrates the right attitude of the subject by the classical example of David and Saul, and from more recent historical examples shows the judgment which overtakes those who rise against their legitimate princes. We have already cited the letter as illustrating the persistence of the characteristic mode of thought of Gregory the Great in the ninth century, and there is nothing to surprise us in the fact that those who disapproved of the revolt against Lewis the Pious should have appealed to these principles,²

Perhaps the strongest illustration of the tendency to conceive of the deposition of the king as being under certain circumstances justifiable is to be found in a document or proclamation issued in 859 by Charles the Bald against those who wished to depose him. In this document, after appealing to his claim of hereditary succession from the Emperor Lewis, he argues that he was elected with the will, consent, and acclamation of the bishops and other faithful men of the kingdom, and was consecrated, anointed, and crowned by Wenilo, Bishop of Orleans, and that from the office in which he was then placed he cannot be cast out, at least without the judgment of the bishops by whom he was then consecrated. "They are," he says, "the thrones of God," among whom God sits, and by whom he decrees judgments, and to their paternal correction and chastisement he is willing to submit, and does submit.¹

We shall have to consider this passage again in discussing the relation of the ecclesiastical and secular powers, but in the meanwhile it is worthy of note, as indicating in a very forcible way that the deposition of a king, who was held to have failed to discharge his obligations, was a thing not wholly improper in the minds of the men of the ninth century. We may very well recall those phrases concerning the distinction between the king and the tyrant which we considered in a previous chapter, and we shall feel that the conception of the character of the king, as depending upon his respecting and maintaining justice, was not a mere piece of abstract sentiment, but was tending to have a more or less practical and effective influence on public life.

CHAPTER XXL

THE RELATION OF THE AUTHORITIES OF CHURCH AND STATE.

WE must now resume the consideration of the theory of the relations of the secular and ecclesiastical authorities. No student of the history of the Middle Ages will doubt that the theoretical and actual relations of the two great powers in society continually exercised a very strong influence upon the theory of the State and the theory of the origin and nature of political authority.

To the political theorists of the ninth century, however great their reverence for the king and the secular authority, there is obviously always present the consideration that alongside of the law of the State there stands a law which the nation has not made, a law which is more majestic and authoritative than that of any secular society—the law of the Christian Church; and that alongside of the secular organisation and institutions there stand the organisation and institutions of the Church. If the ruler is bound to respect the law of the nation, much more is he bound to respect and obey the law of the Church; and while the great organisation of the Catholic Church may admit him to some share in its councils, may look to him for assistance in enforcing its decrees, yet the Church is not only independent of him in religion but looks upon him as its subject in spiritual matters.

We have seen that the patristic theory of the relation of the two powers, the ecclesiastical and the civil, finds its completest statement and definition in the letters and tractates of Gelasius I. These may also be said to furnish us with the best starting-point for examining the theory of the ninth century. The bishops of the empire, in a long and important statement on the condition of Church and State and the nature of ecclesiastical and civil authority, addressed in the year 829 to the Emperor Lewis the Pious, quote and comment on the words of Gelasius' twelfth letter, in which he had said that there are two authorities by which alone all the world is governed

—the sacred authority of the bishop and the power of the sovereign.¹ The same passage is quoted by Jonas of Orleans in the first chapter of his work ‘De Institutione Regia,’² while Hincmar of Rheims cites the words of this letter and also those of Gelasius’ fourth tractate.³

It is important to observe not only the fact that these passages are quoted, but the character of the comments which are made on them. The bishops in 829 preface their quotation by the statement that the body of the Church of God is divided chiefly between two exalted persons, the priestly and the royal. Jonas of Orleans puts the same view more clearly when he tells us that all faithful men should know that the universal Church is the body of Christ, and that Christ is the head of the body, and in this body there are two persons of chief authority, the priest and the king. While Gelasius thinks of these two authorities as existing in the world, the bishops and Jonas conceive of them as being both within the Church.

It is also worth noting that while the bishops simply quote the words of Gelasius, “In quibus tanto gravius pondus est sacerdotum,” Jonas, in his introduction, calls the priestly person *præstantior*, and in applying this conception he urges that the priest must always anxiously care for the salvation of the king and carefully admonish him lest he should turn aside from the will of God or neglect the charge which God has committed to him. While Gelasius, that is, insists only upon the obedience which the king should render to the priests in religious matters, and the priest to the king in secular matters, Jonas also thinks that the priest is in some measure responsible to see that the king does his duty even in secular affairs.

Hincmar embodies large parts of the tenth letter and of the fourth tractate of Gelasius. Christ is the only person who was both king and priest, and although there is a sense in which Christians may be called a royal and priestly race, yet Christ, mindful of the infirmity of human nature, has allotted to each authority its own duties, so that Christian kings require the bishops for eternal life, and the bishops require the king for temporal things, and therefore the clergy should keep themselves clear of secular business, and the secular person should not interfere in spiritual matters. So far Hincmar does little more than follow Gelasius, but his development of the principle “*Tanto gravius est pondus sacerdotum*,” &c., is different and noteworthy. The burden of the priest is greater, because he will have to give account, in the judgment, even for kings, and the dignity of the bishop is greater than that of the king, because kings are consecrated to their office by the bishop, while the bishop cannot be consecrated by kings.

In three important points, then, we see that some ninth-century writers have developed the position of Gelasius,—the first, that both the secular and the spiritual powers are within the Church; the second, that in some measure the priest is responsible to see that the secular ruler does his duty; and the third, that the dignity of the ecclesiastical person is greater, for it is by him that the king is consecrated: and each of these principles has importance in the ninth-century conception of the relation between the spiritual and the temporal powers. In the main it is clear that the ninth century simply carries on from the sixth the principle of the two authorities in society—two authorities which are theoretically independent of each other in their own spheres; but the experience of the ninth century tended to bring out the difficulties of this position, and to develop the tendency towards the assertion of the priority of one or other of the two. The conditions of

the time are indeed so complex that we could easily quote phrases from the legal documents and the general authors of the period to support almost any theory of the relations of the two powers. It would be easy to produce evidence to show that the temporal power was really superior even in ecclesiastical matters ; to show that the consent of the king or emperor was necessary for ecclesiastical action, and that it was the secular power which controlled all ecclesiastical appointments. On the other hand, it would be quite as easy to produce evidence to show that the Church was actually superior to the State ; that the king was absolutely under the canonical law, liable to excommunication like any private person; that it was the Church which really conferred the royal authority, and that the Church could take it away again.

A century or two later we shall find views of this kind set out in open contradiction to each other; we shall find Europe filled with the clamour of the great struggle for supremacy between the Church and the Empire. But it is the characteristic of the ninth century that these apparently divergent tendencies of thought can often be traced in the same person; that we find the same person using language which in later times would mark him clearly as a papalist, and the next moment using phrases which became the catchwords of the imperialist.

It is possible, no doubt, to maintain that in the early years of the ninth century the authority of the State relatively to the Church was at its highest point, and that the opposed conception develops throughout the century till it culminates in the pseudo-Isidorian literature. But we think that the safest judgment which we can form on the whole character of the ninth century is this, that men were convinced that each power had its own appropriate sphere, but that they were also keenly alive to the fact that in practical life the two spheres intersected, and that no general principle could enable them to determine, with regard to many questions, what exactly was the sphere of the State and what the sphere of the Church.

We may find a very good illustration of the complexity of the situation and the ambiguities of theory in the position of that writer to whom we have already so often referred, Sedulius Scotus, whose work seems to belong to the middle of the century. He does not seem to have had the same practical experience of affairs as Hincmar of Rheims, and there are therefore some points on which Hincmar is his superior; but he shows a considerable power of putting together his views, so that, in spite of a certain incoherence of detail, they really form an organic whole. At any rate, it may be useful to consider for a moment what are his views as to the position of the emperor or king relatively to the Church.

He begins his treatise by urging the prince to remember that he should give thanks to God and honour to His Church. The whole commonwealth flourishes when the king fears and honours God and provides carefully for the wellbeing of the Church.¹ The charge of the king, then, is not to be thought of as merely secular. The work of the king is to set forward such conditions as will further the cause of religion as well as the temporal wellbeing of the State. If his heart is not set upon God's service, God may take the kingdom from him.² He has therefore great responsibilities in Church matters as well as in secular. He must prefer the wellbeing of the Church to his own personal advantage, and must help and protect all those who work in God's service.³ We have here simply the common medieval conception of the duty of the ruler of the State to do what he can to further the

work of the Church. Sedulius evidently did not imagine that the State could stand aside and refuse to take a part in the service of religion. But this is not all. The good ruler, he says, will set forward the wellbeing of the Church in all ways, and he must remember that God has set him as His vicar in the government of the Church, and has given him power over both orders of rulers and subjects,¹ and therefore he is especially admonished to see to the holding of synods every year.² We have in an earlier chapter referred to this title of the Vicar of God as applied to the secular ruler. Certainly as used by Sedulius it seems clearly to imply a large measure of authority even over the Church.

So far we have one aspect of the theory of Sedulius. But if we now turn back to the eleventh chapter of his treatise we shall see the other side of the matter. Here also the king is admonished to provide diligently for the meeting of synods, inasmuch as these are of great benefit to the Church. But then, abruptly and somewhat sharply, he is warned that he must not interfere recklessly in ecclesiastical affairs; he must show himself humble and very cautious, and beware lest he should take upon himself to judge of any ecclesiastical affair before he has learnt the decrees of the synods. The pious ruler will carefully hear what is just and lawful according to the canonical decision of the holy bishops, and will then give his consent and authority to what is just and true. He will in no way form any *præiudicium* on such matters, lest haply, falling into error, he should find himself guilty of some fault hateful in the sight of God. Sedulius enforces this with a story of how Valentinian, when he was invited by the bishops to take part in some doctrinal discussion, said that he was in no way worthy to take part in such matters, but that this belonged to the priests.⁵ Sedulius follows this up in the next chapter by urging the ruler to make himself an example of humility and obedience. If he is reproved by wise men he should repent; and Sedulius cites the examples of David and Nathan, of Theodosius and Ambrose.¹

If, then, in the title of Vicar of God in the government of His Church Sedulius expresses something of the authority of the king even over churchmen, in his treatment of his relation to the synods and their decisions he gives us the other side of the matter. It must be noticed, however, that even here the king has his own place, at least in the execution of Church law. After he has heard the judgment of the bishops, it still remains for him to give his consent and authority to what has been decreed.

We have before cited the letter of Cathulfus on the nature of the royal authority. He states, even more emphatically than Sedulius, that the king is the representative of God, and he certainly seems to imply that the position of the bishop is secondary. He bids the king remember God always with fear and love, for he is in God's place, to watch over and govern all God's members, and will have to give account for these in the day of judgment. The bishop is, in the second place, "*in vice Christi tantum*." The king must therefore carefully see that he establishes the law of God over the people of God, whose place he holds, "*cujus vicem tenes*." He must, with his bishops, superintend the life of the monks and nuns, but he must do this through spiritual pastors, not through laymen, for that would be wickedness.² We should judge that the position of Cathulfus was practically the same as that of Sedulius, though undoubtedly he is more emphatic in his assertion of a certain priority of the royal power. The letter is, however, too brief, and the discussion too incomplete, to enable us to form a very definite decision upon the subject.¹

The conception of the separate provinces of the secular and the spiritual powers is so well defined in the fifth century, and so carefully restated in the ninth, that we cannot doubt that all parties, lay or clerical, would have, in theory, held that the powers were co-ordinate, and, in their own spheres, independent of each other. But, as a matter of fact, circumstances were too strong for theory, and not only did the definition and delimitation of the boundaries of the province of each power prove a task of insuperable difficulty, but each power in turn found itself compelled to trench in some measure upon the province of the other. We begin by considering some of the many points in which, in spite of the theory of the independence and authority of the Church, the State did actually trench upon its prerogatives.

We have seen how Sedulius and Cathulfus speak of the king or emperor as the vicar of God in the government of His Church ; that is, they conceive that it is part of the duty of the civil ruler to maintain good order and piety in the Church. We find the same principle very strongly declared by Smaragdus. He urges upon the king that if he sees anything wrong in the Church of Christ it is his duty to reprove and correct it. If he sees any person in the Church of God running into luxury or drunkenness, he is to forbid, to terrify him. He is to put down all pride and anger with threats and sharp reproofs. He is to do what he can as a king, as a Christian, and as the representative of Christ (“pro vice Christi qua fungaris”).¹ We can find illustrations of this conception of the duty of the civil ruler to maintain good order and discipline in the Church in the proceedings of Charles the Great, of Lewis the Pious, and of Charles the Bald. In the “Capitula de Causis cum Episcopis et Abbatibus Tractandis” of 811 we have a list of topics on which the bishops and abbots are to be interrogated, and certainly the tone of the questions indicates clearly enough that Charles the Great thought it his duty to look very sharply into the conduct of the clergy even in purely religious matters.² In the “Admonitio ad omnes regni ordines,” issued by Lewis the Pious in 823-5, Lewis lays down very explicitly the principle that it is his duty to admonish men of all orders as to the discharge of their duties, and frames regulations for a very comprehensive inquiry which is to be made by taking the evidence of the bishops about the conduct of the counts in administering justice, and that of the counts as to the conduct of the bishops in their life and teaching.³ In the “Capitulare Septimanicum apud Tolosam datum” of 844 we find Charles the Bald strictly forbidding the bishops to take action against those priests who had appealed to him for protection against the oppression of the bishops, and warning them that they must obey his injunctions, and see that every one obeys the Canons.¹ In 853 we find the same Charles sending round his “missi” to hold inquiries and correct abuses in all cities and monasteries along with the bishop of each diocese.²

There are even indications in the literature and history of the times that the responsibility of the emperor for the conduct of the Church extended to the condition of the papacy itself. We do not wish to enter into any discussion of the exact character of the purgation of Pope Leo III. in the year 800, but at least it is clear that Charles the Great had been gravely concerned with regard to the charges brought against the Pope. Leo III. was very careful, in purging himself by oath of the crimes laid to his charge, to make it quite clear that he did this of his own free will, and not as one amenable to the judgment of any man, and to guard against his action being taken as a precedent for his successors;

but his own statement makes it clear that Charles had come to Borne, in part at least, to inquire into the matter.³ And in spite of the care Leo III. had taken to guard against his action becoming a precedent, we cannot help feeling that Pope Leo IV. was following in Leo III.'s steps, and was even going somewhat further, when, in his letter to the Emperor Lewis II. of about 853, he expressed his willingness that the emperor and his "missi" should inquire into the charges which had been made against him, and his readiness to amend everything according to their judgment.¹

We think that all this will serve to show sufficiently clearly that the civil ruler in the ninth century was thought of, and was recognised in fact, as having some real responsibility for the good order and conduct of the Church. He was not only the protector of the Church against external enemies, but was, at least in some measure, responsible to guard it against corruption and decay. How exactly this responsibility was to be carried out into practice was a very uncertain matter, and one upon which, when put to the test of practical action, men in the ninth century would probably have differed greatly; but there

seems no doubt that this conception of the responsibility of the king was held very commonly, if not universally.

It is partly at least from this standpoint that we may most usefully consider the relation of the civil ruler of the time to the synodical and legislative organisation of the Church. We do not think that any one doubted the independent legislative and administrative authority of the synods of the Church, but yet we find that the synods are constantly spoken of as being called together by the emperor or king as well as by the ecclesiastical chiefs, and that the decrees, administrative or legislative, of the synods, are issued with the co-operation of the royal power.

We may take as our first example of this condition of things the Capitulare of Karlmann of 742. Here we find Karlmann, with the counsel of the bishops, presbyters, and chief men of the kingdom, decreeing that a council and synod should be held to advise him how religion and the law of God might be restored, and then, with the bishops and great men, ordering that synods should be held every year, at which the king should be present, and by which the canons and laws of the Church should be restored.¹ We find parallels in Charles the Great's Capitulary of 769,² in the "Capitulare Haristal- lense" of 779,³ and in the "Admonitio Generalis" of 789.⁴ We are specially told that Charles the Great was present at the Synod of Frankfort in 794, and he is said to have presided.¹ The synod, we are told, was called together by the apostolic authority and by that of Charles the Great.² Perhaps the most marked recognition of the imperial share in such ecclesiastical business is to be found in the Epilogue to the decrees of the Council of Arles of 813. In this we find the decrees presented to the emperor, and he is asked to add anything which may have been omitted, to correct anything that may be wrong, and to aid in carrying into effect whatever may have been rightly decreed.³

It may perhaps be urged that these examples are all taken from the time of Charles the Great himself, and that his relation to the Church was wholly exceptional; but we can find some parallels at least later in the century. In 818-19 Lewis the Pious issued a number of capitula on ecclesiastical and secular matters, and it is worthy of note that the form in which this is done is very much the same as that in the earlier cases. Lewis calls

together his bishops, abbots, and great men, and with their advice issues the Capitula which are to be observed by ecclesiastics and laymen alike.⁴ The proceedings of the Synod of Ponthion in 876 seem to show that the principle that synods should be summoned by the king or emperor, and that he might preside at them, was still accepted. The Emperor Charles the Bald is said to have presided at this synod, and it is spoken of as having been called together by the Pope and the Emperor.¹

The history of the century seems to illustrate very exactly the theory as we have seen it in Sedulius and Smaragdus or Cathulfus. The king is responsible for the good order of the Church, and at least has his share in the calling together of the synods of the Church and the promulgation of their decrees.

There is yet one further point of Church order in which the influence of the secular power is very great—that is, in the appointment of ecclesiastics. We do not wish to enter upon a discussion of the many and intricate questions connected with this subject, but we must deal with it so far as is necessary to bring out the fact that here again the theory of a separation of the two powers was found impossible of literal application to the actual circumstances of the time. The emperor or king did as a matter of fact exercise a most powerful influence over all appointments of the greater ecclesiastics, and the propriety of this is not denied by any writer of the ninth century.

The bishops, in their address to Lewis the Pious of 829, quite frankly recognise this, and exhort him to see that the greatest care is exercised in appointing pastors and rulers in the Church of God.² Hincmar of Rheims is quite as frank in recognising the authority of the secular ruler in the appointment of bishops. In his treatise, “De Institutione Carolo-

manni,” he very clearly reckons the consent of the prince, and the election of the clergy and people, as the proper elements in an appointment to ecclesiastical rule;¹ and in a letter to Lewis III., occasioned by some dispute about the appointment of a Bishop of Beauvais, he again admits very frankly that the consent of the prince is a necessary part of the appointment to such an office. This is the more noticeable, as the general purpose of the letter is to condemn and correct what Hincmar clearly thought was an exaggerated conception of the royal authority with regard to ecclesiastical appointments. We must indeed notice how emphatically Hincmar condemns the notion that the appointment of a bishop was a matter in the arbitrary power of the prince, attributing this to the suggestion of the devil himself, and that he wholly denies that the prince can order the election of whomsoever he pleases. A bishop, Hincmar seems to mean, should be elected by the other bishops of the province, with the consent of the people and clergy of the diocese, and when the prince has given his consent he is to be taken to the metropolitan for consecration.² We do not enter into any discussion of Hincmar’s position with regard to the part of the metropolitan and the other bishops of the province in the election of a bishop: it is enough for us to observe that Hincmar clearly admits the place of the secular ruler, but as clearly also is anxious that this should be defined and limited.

A position very similar to that of Hincmar is represented by the little treatise “De Electionibus Episcoporum,” written by Florus Diaconus, a writer of the ninth century. Here also it is candidly admitted that in certain kingdoms the custom prevailed that a bishop should be consecrated after the prince had been consulted, and Florus admits that

this custom tends to peace and tranquillity, but he emphatically denies that it is necessary to a proper consecration.¹ Florus maintains that the true requirements for a proper appointment are the election of the clergy and the whole people of the diocese, and consecration by the lawful number of bishops;¹ and he urges that for nearly four hundred years from the time of the apostles no consent was asked from the secular power, and that even after the emperor was Christian this liberty for the most part continued.²

The position of Hincmar and Florus is not quite identical. Hincmar looks upon the consent of the prince as normally necessary for the appointment of a bishop; Florus considers this as a legitimate custom of some kingdoms, but not as being a universal custom, and still less does he admit it to be of universal obligation. But they agree in admitting that, as a matter of fact, the secular ruler has a considerable power with regard to ecclesiastical appointments, while they are both concerned to correct any exaggerated conception of this.

It is perhaps necessary to say a word about the theory of the relation of the emperor to the papal elections. We may begin by observing that Florus Diaconus assumes that the consent of the civil power is never asked for in this case.¹ Whether such a statement can be taken as accurately representing the relations of the emperor to the papal elections in the ninth century is doubtful. The “*Pactum Hludowici Pii cum Paschali Pontifice*” of 817 does, indeed, agree with this in its careful provision that no one is to interfere with the election of a Pope, but that it is to be left in the hands of the Romans, and that they are freely to elect him whom the divine inspiration and the intercession of St Peter suggest. Only after the consecration is an ambassador to be sent to Lewis or his successor to arrange for the continuance of friendship and peace between the Emperor and the Pope.² The terms of Lothair’s “*Constitutio Romana*” of 824 are so far in agreement with this. It reiterates the provision of the *Pactum*, that no one is to take part in the election of a Pope except the Romans themselves.³ There is in existence, however, a form of oath, supposed to be of this time, required of all those who were to take part in the papal election: this not only makes the electors swear allegiance and fidelity to the emperor, but also includes a provision that he who is elected is not to be consecrated until he has taken such an oath in the presence of the “*missus*” of the emperor as that taken by Pope Eugenius. From a passage in Einhard’s *Annals* for 827, it would appear that on the death of Valentinus, his successor, Gregory IV., was elected, but not consecrated until the ambassador of the emperor had come and examined into the character of the election.¹ It must, however, be noticed that these documents, and especially the “*Pactum*,” while they are probably genuine in substance, are probably not all authentic in detail.

Our examination of these matters will, we think, have served to bring out sufficiently clearly the fact that, whatever might be the theory of the division of functions between the secular and the spiritual powers, the secular power did in practice certainly tend to exercise a very considerable authority even in the strictly spiritual sphere. We may say that the foundation of the whole situation, as far as theory is concerned, lies in this, that it is the duty of the civil ruler to care for the wellbeing of the Church, and to interfere when he sees that the Church is, for any reason, being badly administered or falling into corruption. We can see how this conception naturally gives rise to the theory that it is the king’s duty to see to the regular meeting of

synods, and thus gives him necessarily a share in the legislative, as well as the administrative, control of the Church. It is easy also to see how this conception of the responsibility lying upon the king to see that justice and righteousness prevailed in the Church as well as elsewhere, might lead to a considerable ambiguity in his relation to the discipline of the Church. The relations of the empire to the Papacy in the cases of Leo III. and Leo IV. are but the final examples of a tendency to look to the civil power to set things right in the Church, when there was no one else who could act. And, finally, the tendency to subject ecclesiastical appointments to some control on the part of the civil ruler, while it has many other political and social relations, may also be regarded in part at least as illustrating the same conception, that the secular power has its own responsibility for the good order of the Church, and has therefore necessarily something to say with regard to the persons to whom the government of the Church is to be intrusted.

We have said enough, we think, to make it clear that in the ninth century the theory of a strict duality of authority in society does not prevent the civil power from acting very frequently in the sphere of the ecclesiastical, and that this intervention is not only tolerated in practice, but is to a considerable extent justified in theory.

We must now consider the other side of the subject, the extent to which the ecclesiastical authority intervened in civil affairs, and the character and conditions of this interference. We may begin by observing that if the king or emperor is by some writers styled the Vicar of God, the same title is also claimed for the bishops.¹ Hrabanus Maurus calls the priests or bishops the vicars of the prince of shepherds in the Church of God, and warns them to be determined against the proud and contumacious, to be careful that no earthly power terrifies them in their rule of souls, and no worldly blandishments soften their rigour.¹

What is more important than this title of Vicar of God, it is certain that the people of the ninth century were perfectly clear that the ecclesiastic is bound to correct and reprove persons of every rank and degree,—to use against them, if necessary, the severest penalties of the Church. A very strong phrase is used by a synod held in 859, which expresses this very directly and forcibly: the bishops are exhorted to be united in their ministry and holy authority, and with mutual counsel and help to rule over and correct kings and the great ones of the earth, and the whole people committed to them in the Lord.² The same view is very strongly expressed by many writers. Alenin exhorts the priest to declare the Word of God, and the prince to obey.³ Jonas of Orleans quotes that passage from the history of Rufinus, discussed in an earlier chapter, in which Constantine is represented as saying to the bishops that God has made them the judges of all, and that they cannot be judged by any.⁴ The same passage is quoted by the bishops in that address to Lewis the Pious which we have already frequently cited.⁵ There is, therefore, nothing that we should regard as new, when we find the pseudo-Isidorian Decretals using very strong language about the subjection of princes to bishops. In his 39th Decretal letter Clement is represented as saying that all princes of the earth are to obey the bishops, to submit to them and help them, and that those who oppose them, unless they repent, are to be put out of the Church.¹

The political theory of the ninth century, then, very clearly recognises that there is an authority in the Church which extends over all persons, even the most exalted in society. It will be useful to consider more closely the relation of the civil order and the civil rulers to the law and discipline of the Church. We have already examined the treatment in

Hincmar's work, 'De Ordine Palatii,' of the relation of the king to the law of the State; we have seen that Hincmar expresses the general view of the ninth century when he maintains that these laws are binding upon the king.² Hincmar goes on to say that much more must the king obey the divine laws.³ There is a system of divine law in the Church to which all men owe their obedience. We do not wish to enter into so complicated a subject as that of the gradual formation of the body of Church law: to do so would take us very far away from our proper topic. It will here suffice if we point out that by the ninth century there were in existence and circulation in Western Europe collections of Church regulations on doctrine and discipline, and these regulations were looked upon as having in some sense a divine authority. There are some words in Hincmar's treatise 'Pro Ecclesie Libertatum Defensione' which may very well be taken as representative of the attitude of the ninth century towards these laws. This is the treatise written by Hincmar in the early stages of the quarrel between Charles the Bald and Hincmar's nephew, Hincmar, Bishop of Laon. Hincmar at first sided wholly with his nephew, and wrote this treatise to protest against the royal action, which at first he looked upon as an outrageous interference with ecclesiastical prerogative. A vassal of the Bishop of Laon had complained to Charles of his treatment by the bishop, and Charles had summoned the bishop to appear and to answer before his courts. When he did not appear, Charles put his property under the ban. Hincmar of Rheims protests against such action as being wholly improper and even scandalous, and quite contrary to the canons and the laws. He quotes St Leo as saying that the canons were enacted by the Spirit of God, and confirmed by the reverence of the whole world, and were established by men who now reign with God in heaven and still work miracles on the earth.¹

We think that these words are highly characteristic of the general attitude of men in the ninth century towards Church law. No one, we think, doubted that in some sense all men of all ranks were bound to obey it. Earlier in the century Agobard of Lyons had used phrases similar to those of Hincmar. Agobard is writing of the proceedings of the bishops at Attigny and Compiègne, and represents himself as making a speech in which he discussed the nature and authority of the canons of the Church. In former times, he said, the holy bishops had come together and decreed that the canons must be preserved inviolate, inasmuch as they had been confirmed by the Spirit of God, the consent of the whole world, the obedience of princes, the agreement of Scripture, and that from that time it had been an accepted doctrine that any action against the canons was an action against God Himself, and against His universal Church, and that they could not be violated without danger to religion.² A little earlier in date still we find a letter by Siegwald, Bishop of Aquileia, mutilated unfortunately and only partly comprehensible, in which we have a very emphatic exhortation to Charles the Great on the duty of obeying the canons. In spite of the fragmentary state in which it has come to us, we can make out fairly clearly the emphatic terms in which Charles is admonished to observe and enforce obedience to the canons.¹

There is, then, a body of law in the Church which all men must obey and to which all other laws must conform themselves. Hincmar considers the question of a possible collision between the national system of law and the divine law, and is perfectly clear that in such a case the human laws must be altered and made conformable to the divine;² and in another treatise written by Hincmar we have an exposition of the superiority of the divine law, and men are reminded that they may now justify themselves in their actions

by appealing to human laws and customs, but in the day of judgment they will have to answer, not to the Roman, or Salic, or Gundobadian laws, but to the divine and apostolic laws. Hincmar urges that in a Christian kingdom even the public laws should be in accordance with the principles of Christianity.³

There is again, therefore, nothing new in the strong phrases in which the Pseudo-Isidorian Decretals express the principle that no emperor or other potentate may do anything contrary to the divine commands: if the judges, at the king's desire, should command anything unjust or contrary to the evangelical, or prophetic, or apostolic doctrines, such commands have no authority.¹

The secular ruler, then, must, like other persons, obey the divine law, and if he refuses to do this he is subject to the discipline of the Church. It is indeed clear that there were some in the ninth century who doubted or denied that the authority of the Church extended so far as to the excommunication of the king or emperor. From that section of Hincmar's treatise on the divorce of Lothair and Tetburga, to which we have so often referred, it is clear that there were some who denied that the king was liable to the judgment of the bishops of his own dominions, or to that of any other bishops. Some wise men, says Hincmar, maintained that the king is subject to no laws or judgments but those of God alone, who made him king; and that, as he should not be excommunicated by his own bishops, whatever he may do, so he cannot be judged by other bishops. Hincmar, indeed, makes short work of this contention, describing it concisely as blasphemous and full of the spirit of the devil, and then shows by a series of examples, drawn from the Old Testament and Church history, that kings were reprov'd by the prophets and separated from the Church by bishops;² and at the end of this section of the treatise he lays it down that the synods of the Church know no respect of persons.¹

Hincmar's judgment is clear, and we do not doubt that almost all ecclesiastics in the ninth century would have agreed with him. That the Popes may have been unwilling to go the length of directly and explicitly excommunicating the emperors of the fifth and sixth centuries, we have seen in former chapters. But in their relations to the Frankish rulers the Popes were not so restrained. As early as 770 we find Stephen III. threatening to excommunicate Charles and Carloman if they neglected his injunctions against a marriage with the daughter of the Lombard king Desiderius;² and in regard to this very question on which Hincmar writes we find that Pope Nicholas threatened at last to excommunicate Lothair unless he would take back Tetburga.⁸

It must at the same time be noticed that we may find a partial explanation of the existence of such views as those which Hincmar condemns, in the tone of some letters of Pope Leo IV. in reference to a threat of Hincmar to excommunicate the Emperor Lothair. He complains of the pride of Hincmar, which had led him to threaten with excommunication the emperor whom Pope Paschal had consecrated with the oil of benediction, thus violating every divine and earthly law.¹ Leo IV.'s phrases are no doubt related to such a question as whether it was competent for any one except the Pope himself to excommunicate kings and emperors, and must not be construed as meaning that Leo would not have claimed that authority for himself: they belong to the question of the relation of the authority of bishops and metropolitans to that of the Pope. But it is easy to see that such phrases might tend to encourage the judgment that within his own dominion the ruler was not amenable to the jurisdiction of Church courts. There were

clearly certain ambiguities and uncertainties in regard to the relation of the discipline of the Church to the monarch in the ninth century ; but no doubt, also, the Church was very clear that it had spiritual authority over even the highest in station.

No doubt these claims, that the church should exercise jurisdiction even over the most exalted persons in the State, are to be interpreted as referring to spiritual matters. But it was not easy to draw a clear line between things which were to be regarded as spiritual and those which belonged to the secular sphere. We have already noticed that Jonas of Orleans, in commenting on the twelfth letter of Gelasius, urges that as the priests will have to render account to God for kings as well as for private persons, it is their duty carefully to admonish them lest they depart from the will of God, or from the proper discharge of the office which was committed to them.¹ The ecclesiastical order was in some measure responsible for the just administration of the State, just as we have seen that the king was responsible for the good order of the Church. It is interesting to see that this principle finds expression in some of the formal documents of these times. In the "Praeceptio" of Chlothar II., of about the end of the sixth century or the beginning of the seventh, we find it provided, that if any judge should condemn a man unjustly in the absence of the king, the bishop is to reprove him.² Again, in the documents concerning the election of Guido in 889 we find a provision that the common people are to have their own laws, and are not to be burdened further than the laws allow: the count is to see to this, but if he neglect his duty, or allow injustice to be done, he is to be excommunicated by the bishop of the place till he has rendered satisfaction.³ Again, therefore, we find nothing strictly new in the emphatic assertion of the Pseudo-Isidorian

Decretals, that any one who is oppressed should freely be allowed to appeal to the priest.¹

The intervention of the bishops for the protection of the oppressed has, indeed, a long and complex history. As early as the time of Justinian we find the Imperial Government laying upon the bishops a great deal of responsibility for the supervision of the expenditure of money left for public charities and other public purposes; and we even find them given a considerable power of intervention, to protect the citizens against attempts on the part of the magistrates to impose improper exactions.² It may be doubted whether such powers were originally given to them on account of their spiritual authority, or because of the position occupied, by the bishops as prominent citizens in their dioceses: the truth probably is that both their secular and their ecclesiastical position contributed to bring about such arrangements. However this may be, it is clear that in the ninth century the Church, through the bishops, exercised a very considerable authority in the control of even the secular affairs of society, altogether apart from that authority which the bishops possessed as being among the great men of the kingdom or empire.

The Pope and the bishops of the church exercised a considerable authority in the appointment and in the deposition of kings and emperors. We do not wish to discuss the question which in later times was often raised, as to the nature of the authority by which Charles the Great was elected to the empire. In later times men on the one side maintained that this was done by the Pope,—that he in the plenitude of his power conferred the empire on Charles; while on the other side it was held that the action of the Pope was simply that of one who recognised his accession, and by consecration invoked on it the divine blessing. We do not know that there is any reason to suppose that at the time the theory of the matter occupied men's minds to any serious extent at all.

The Franks had come to Italy on the urgent invitation of the Popes as their protectors against the Lombard power, and later on against the Greek power. Pope Stephen II. had recognised Pippin as king of the Franks, and had afterwards crowned him, and finally Pope Leo III. had crowned Charles the Great as emperor. We doubt whether at the time it occurred to any one to consider what precise authority lay behind these acts. There is no doubt, however, that in the ninth century we find clear traces of the rapid development of a theory that the Pope had some very distinct share in the appointment of emperors or kings, and that the consecration by him was regarded as something more than the mere solemn recognition of a proper election or succession, and the invocation of the divine blessing. And so also with the position of the bishops in the appointment and consecration of kings, there are very clear traces of the conception that they had a great deal to say in elections, and that their consecration was looked upon as a very important matter.

It is here again difficult to say how much of the authority of the Pope or the bishops is to be attributed to the political importance of their position among the most important magnates of the empire, and how much to their religious authority. We must be prepared to recognise that each has its real influence, while these two elements of their authority are often fused to such an extent that it is exceedingly difficult to separate them. When, for instance, we find that the provisions for the partition of his dominions by Charles the Great, after they had been considered and sworn to by the magnates of the empire, were sent to Pope Leo that he might subscribe them,¹ we can hardly say whether this is to be taken as a recognition of some right in the head of the spiritual power as such to take his part in these arrangements, or whether it is to be interpreted as due to the sense of the great political influence

which the Pope had exercised and was still exercising in Western Europe, and especially in Italy.

Whatever may be the exact meaning which we are to attach to such a recognition of the authority of the Pope, there is no doubt of the importance of his position later in the century. In the 'Chronicon Salernitanum' there is preserved a letter of the Emperor Lewis II. written to the Emperor Basil of Constantinople in 867. It appears that Basil had expressed his indignation that Lewis should call himself "Imperator Augustus." Lewis defends his use of the title on the ground largely that he had been anointed and consecrated by the Pope, and says that those Frankish princes were called first kings and then emperors who were anointed with the holy oil by the Pope.¹ It has been suggested that this letter is spurious—that it is impossible to think that any Frankish emperor would have spoken in such terms. It seems to us that such a line of argument is exceedingly unsafe, for, apart from this letter, there is considerable evidence that at least in the latter part of the eighth century it was frequently recognised that the Pope had a very important part in the appointment and consecration of kings and emperors. In a former chapter we have referred to the terms of the document concerning the election of Charles the Bald to the kingdom of Italy at Pavia in 876; we must now notice in this document the reference to the elevation of Charles, a few months earlier, to the empire as being the work of the Pope. The bishops and other magnates of Italy elect Charles as king in view of the fact that God had raised him to the imperial throne by means of the vicar of the blessed prince of the apostles Peter and Paul, Pope John.² It might, perhaps, be suggested that this is only an Italian view of the appointment of Charles the Bald, but the same conception is expressed in the proceedings of the synod of Ponthion, which was

held in June and July 876. We learn that at this synod the proceedings of the Italian magnates at Pavia were read and confirmed: the part of the Pope in the election of Charles to the empire seems as clearly recognised at Ponthion as it had been at Pavia.¹ We find similar references to the influence of the Pope in the election of kings in the separate kingdoms which made up the empire, while here we also find a similar authority attributed to the bishops. In the proceedings of the synod held at Quierzy in 858 we find some very significant phrases on the subject. The synod sent a letter, which is thought to have been composed by Hincmar of Rheims, to Lewis of Germany, protesting against his invasion of the territories of Charles, and addressing a special remonstrance to those archbishops and bishops who had themselves, with the consent of the people, anointed Charles to be king, while the Holy See had afterwards honoured and confirmed him, by letters, as king. The synod evidently attaches great importance to the unction, and speaks of him who faithlessly and contumaciously lifts his hand against the Lord's anointed, as of one who despises Christ, and who will, therefore, perish by the spiritual sword.² Again,

we find the archbishops and the bishops of the kingdom of Arles electing Lewis, the son of Boson, to follow his father in that kingdom, and they do this partly on the ground that the Holy See had approved of such an election.¹

We find the strongest and most remarkable assertion of the importance of the consecration and unction by the bishops in another document, which refers to the election of Charles the Bald as King of the Neustrian Franks. This is a proclamation issued in the name of Charles the Bald himself in 859: he recounts how, after his election by the bishops and other faithful men of the kingdom, he had been consecrated and anointed with the holy chrism, and had received the crown and sceptre, and he urges that after this consecration he cannot be cast down from the kingdom by any, at least without the judgment of the bishops by whose ministry he had been consecrated king: they are, he says, the thrones of God, among whom God is seated, and by whom he decrees his judgments, and to their paternal reproofs and chastisements he had been and still was prepared to submit.² We may perhaps suitably recall the phrases in which the bishops describe the deposition of Lewis the Pious,³ and the words of Hincmar in referring to the same event, and to the restoration of Lewis by the bishops with the consent of the people.¹

The importance of this conception of the authority of the Pope and the bishops in relation to the appointment and the deposition of emperors and kings is very obvious. As we have said, it is very difficult, perhaps impossible, to disentangle the relative importance of their spiritual and their secular position in the matter. The fact that they are great persons in Western Europe, or in a particular kingdom, has obviously much to do with it, but there are already clear traces of a theory that, as spiritual rulers, they have some, though it may be a somewhat indefinable, authority over the secular power.

We have endeavoured to bring out as clearly as possible two facts with regard to the theory of the relation of the authorities of Church and State in the ninth century. First, that in the ninth, just as in the fifth century, men believed firmly that the two authorities were separate and independent, each sacred and supreme in its own sphere—that the ecclesiastic owed allegiance to the king in secular matters, and that the king owed allegiance to the Church in spiritual matters. But also, secondly, that the practical experience of the ninth century made it clear that it was very difficult to distinguish the two spheres

by any hard-and-fast line. Still, we think that the writers of the ninth century held to the theory of a dual authority in society; we think that they would have repudiated any other conception.

It is true that there is one work which belongs to this period, which in the later middle ages was interpreted as expressing quite another theory—the theory, that is, of the supremacy of the spiritual power over the temporal. This document is the famous “Donation” of Constantine. We have hitherto left this document out of account for two reasons—first, because it is almost certain that the later interpretation of the document was incorrect; and, secondly, because, whatever its meaning and purpose may have been, it exercised no appreciable influence in the ninth century on the theory of the relations of Church and State.

From our point of view the important phrases of the “Donation” are those which deal with the grant of authority to the Pope, and the transference of the seat of imperial authority from Rome to Byzantium.¹ The exact meaning of these phrases has been discussed by a number of scholars, and it is generally agreed that the interpretation given to them in the later middle ages can hardly be that which was in the mind of the compiler. In later times they were understood to signify that Constantine granted to the Popes a complete temporal authority over the West, and it is not disputed that the words might have this meaning; but it is now generally agreed that they must be interpreted as referring to a grant of temporal authority in Italy. Most historical critics think that the purpose of the document was to assist the Roman See in securing the reversion of the Byzantine territories in Italy, and especially of the Exarchate. It seems possible that the “Donation” was built up in part on traditions which may have been long current in Italy, and that the circumstances of the eighth century, when the Bishops of Rome came to be the actual representatives of the Roman *res publica* in Italy, and its principal defence against the Lombards, may have tended to give these traditions a new significance, and to sug-

gest to the author their reduction to a definite and coherent form. We are not here concerned with the growth of the temporal states of the Bishop of Rome, but it seems to us that so far from looking upon this as the result of an unreasonable greed for secular power, it should be recognised that nothing was more natural than that the Popes, finding themselves to be the actual chiefs of what survived of the ancient Roman State in Italy, should have desired to maintain and even extend their authority. Any one who studies the papal correspondence and the ‘*Liber Pontificalis*’ in the eighth century will, we think, feel that the leadership of the Roman *res publica* in the West was forced upon them rather than deliberately sought. It was only slowly and reluctantly that they drew away from the Byzantine authority, for after all, as civilised members of the Roman State, they preferred the Byzantine to the barbarian; and when circumstances had practically destroyed the Byzantine power in Italy, it was natural that they should seek to hold together, or to recover from the barbarian, even though, like the Frank, he was a friendly barbarian, some fragments of the ancient commonwealth of civilisation. It is of course true that once they had broken with the Byzantine power, they had no inclination for reunion with it, but this again, considering the history of the eighth century, was not unnatural.

It is then generally thought that the purpose of the “Donation” was to assist the Bishops of Rome in establishing a claim to the reversion of the Byzantine authority in

Italy. Other conjectures, such as that of Grauert,¹ that it was intended to support the Frankish empire against the criticism of the Byzantines, though they have been urged with much learning and ingenuity, seem too far-fetched. It must at the same time be recognised that the problem of the date and place of origin of the document is surrounded with perplexities. The "Donation" cannot be later than the ninth century, as it is contained in a manuscript of that time, and is embodied in the Pseudo-Isidorian decretals. How long before that it may have existed is a question of great complexity. In a letter of Pope Hadrian I. of 778 there are phrases which, it is urged, imply a knowledge of the "Donation," but the text cannot be said to render this certain.¹ Hadrian evidently refers to some tradition of great grants of authority by the Emperor Constantine, but whether he is referring to this document is another question. In a letter of the same Pope to Constantine and Irene, of 785, he describes a vision of Constantine, which suggests the tradition which is embodied in the "Donation," but this does not at all necessarily prove that he was acquainted with the "Donation" itself.² The first writers of whom it can be said with any degree of confidence that they are acquainted with this document are Ado of Vienne³ and Hincmar of Pvheims,⁴ in the ninth century. It is certainly perplexing that there should be no certain evidence that the document was known in Italy until the latter part of the tenth century.⁵ At the same time the more recent investigations into its phraseology, and especially those of Scheffer-Boichorst,⁶ seem to make it fairly clear that the work was compiled in Italy, and in the latter part of the eighth century.

In later volumes we shall have to consider what importance this document may have had in the scholastic period. For the present it is enough to say that it produced no appreciable effect upon the political theory of the ninth century. The theorists of the following centuries may have tried to reduce to a complete unity the elements of authority in society; the ninth century writers knew nothing of this.

If we now look back over the political theory of the ninth century, we can lay down certain general propositions about its character. It is, we think, in the first place, clear that there did not exist in this time and among these writers any general philosophical system of political theory. Certain great and important conceptions the men of this period apprehended and developed with force; but in the main it is true to say that they are concerned much more with the practical circumstances of the life of their time than with the attempt to construct a system of political thought. We have pointed out the fact that their statements are often incoherent, sometimes almost self-contradictory; this is the direct consequence of the fact that they are not conscious of any systematic theory as lying behind their practical judgments. We think that when we have recognised this, and if we very carefully keep it in mind, we may still with justice say that their treatment of the character and the foundation of the organised life of society turns upon three great conceptions.

In the first place, they clearly held, and in some measure understood, that conception of the equality of human nature, whose history we have studied from the time of Cicero. They not only reproduced the phrases of the Fathers, but they clearly also understood their point of view. This implies, indeed, something more than the fact that they held to the theory of equality; it also means that they understood and approved the conception of the difference between the primitive condition of man and the actual condition of human society. They held that it was not nature but man's faults which had brought into

existence the conventional institutions of society. It is quite true that, except with regard to the institution of slavery, the subject does not greatly occupy their minds; but it is important, especially with reference to the developed mediaeval theory of society, to recognise that this conception was always alive.

Secondly, they held very firmly to the conviction of the sacred character of the organised structure of society in government. They follow the New Testament and the Fathers in the doctrine that the civil order of society is necessary, and that it is sacred. Indeed it is the very firmness with which they hold this that causes them to adopt the extreme language in which St Gregory the Great had expressed the conception, and sometimes to speak as though any resistance to the actions of those who represented the sacred authority were a thing unlawful and irreligious. The disorders of the time were so great, the necessity of delivering western Europe from the confusions which followed the downfall of the ancient empire in the West was so obvious, that we cannot wonder if at times they exaggerate the principle of obedience to authority.

But, in the third place, the theory of the ninth century recognised with equal clearness the necessity of checking the unjust and tyrannical use of authority. If the Fathers like St Ambrose and St Isidore lay much stress on the limitation of authority by its end—namely, the establishment and maintenance of justice—the ninth-century writers assert this conception with even greater clearness, and, under the influence of the traditions of the Teutonic races, find a practical application of the theory of justice in the conception of the supremacy of law, and of the limited and conditioned character of the authority of the ruler. The emperor or king is bound by the national law, and derives his authority, ultimately no doubt from God, but immediately from the nation, and holds this authority on the condition of his setting forward righteousness and justice in the State.

VOL. II.

THE POLITICAL THEORY OF THE ROMAN LAWYERS AND CANONISTS FROM THE

TENTH CENTURY TO THE THIRTEENTH CENTURY

BY

A. J. CARLYLE, M.A., D.LITT.

PREFACE TO VOLUME II.

WITH this volume we begin the treatment of the political theory of the great period of the Middle Ages, our first volume having really the character of an introduction to this. The materials have, on closer examination, proved to be so large and complex that we have been compelled to devote a whole volume to the political ideas embodied in the two great systems of law which are derived directly from the ancient world. I have felt very keenly how difficult and dangerous a thing it is for a student of history, who has no technical legal training, to deal with those great juristic documents; and indeed I should have felt much hesitation in presenting the result of this work to the public if it had not been for the great kindness of a number of scholars eminent in the civil and the canon law.

I must therefore express my most sincere thanks, first to Professor Fitting of Halle, Professor Meynial of Paris, and Professor Vinogradoff of Oxford, who have very kindly read the proofs of the first part of this volume: and secondly, to Professor Andrea Galante of Innsbruck, who has been so kind as to read the proofs of the second part.

Those eminent scholars are in no way responsible for the judgments which I have expressed, but I am under the greatest obligation to them for a great many most valuable corrections, emendations, and suggestions.

Every historical scholar who knows how great is the mass of imprinted material, especially in the canon law of the twelfth century, will feel that a treatment based only upon printed sources is necessarily incomplete. It is with great regret that we have been compelled by the scope of our work to limit ourselves in this way: we venture to think that the material is sufficient to justify such conclusions as have been drawn. It was with still greater regret that I found myself unable to use some very important printed material for the civil law, and especially Placentinus' treatise on the Code, and Azo's "Lectura"; but no copies of these works are apparently to be found in England, and I have been unable to go to Paris to consult them.

It would be a difficult matter to make a complete list even of the more valuable modern works which deal with the various aspects of the civil and canon law in the Middle Ages, but the following are among the most important:—

F. K. von Savigny, 'Geschichte des römischen Rechts in Mittel- alter.'⁹

H. Fitting, ⁴ Die Anfänge der Rechtschule in Bologna.⁹

„ * Juristische Schriften des friiheren Mittelalters.'

„ Irnerius, ⁴ Summa Codicis ' (Summa Trecensis).

„ Irnerius, ⁴ Quaestiones de Juris subtilitatibus.'

S. Brie, ⁴ Die Lehre vom Gewohnheitsrecht.'

M. Conrat, ⁴ Geschichte der Quellen des Römischen Rechts im Mit- telalter?

E. Besta, ⁴ L'Opera d'Irmerio.'¹

INTRODUCTION.

IN the first volume of this work an attempt has been made to examine some of the sources of Medieval political theory—that is, first, the jurisprudence of the Roman Empire, and the political principles assumed or defined in the writings of the Christian Fathers from the first century to the sixth; and secondly, the political theory of the societies which were built up upon the ruins of the ancient Empire in the West, as it finds expression in the institutions and in the literature of the ninth century. We have seen reason to conclude that while the civilisation of the New World was in many and most important respects different from that of the Empire, and while the political conceptions and customs of the Teutonic States were very different from those of the ancient world, yet it is also true to say that as soon as these began to assume a literary form, we find that the men of the ninth century had inherited much in theory from the ancient society, and that they constantly had recourse especially to the writings of the Christian Fathers for the reasoned framework of their own convictions and principles. The political writers of the ninth century inherited from the ancient world their theory of human equality, of the necessary and divine nature of organised authority in the State, and their principle of Justice as the end and the test of legitimate authority. It would seem that we are justified in saying that the political theory of the early Middle Ages represents a fusion of the political principles of the ancient world with the traditions and customs of the barbarian societies.

When we now come to consider the political theory of the Middle Ages proper—that is, of the centuries from the tenth to the thirteenth,—it will be necessary to take account of elements which are little represented in the ninth century, especially of the direct

influence of the ancient jurisprudence, through the closer and more general study of the ancient law, of the highly important developments of the theory of law and society in the Canonists, and of the necessary modification of the theory of society by the conditions and needs of the slowly developing civilisation of Mediaeval Europe. Finally, we shall come to the time when the theory of the Middle Ages begins to be influenced by the writings of the great political thinkers of Greece, and especially by Aristotle. But this does not come till the middle of the thirteenth century; till that time there is very little of this to be traced in the literature of the Middle Ages.

The elements which go to build up the political theory of this time are very complex, and it is not easy to be certain as to the best mode of approaching them : it has, on the whole, appeared to us best to begin by studying the subject in the technical legal literature, not because this is the most fertile of ideas or the most living in its relation to the time, but because it represents better than the more popular or the more speculative literature the reasoned and considered judgments of the men of the Middle Ages, and also because in the Boman and Canon Law of these centuries we have embodied much of the inheritance of the ancient world. It is well to consider these older elements first; but it is even more necessary that we should in the Middle Ages, as, indeed, at all other times, distinguish between the often hasty and ill-considered phrases of controversy and the reasoned and deliberate record of more dispassionate reflection. Even now it is probably true to say that much confusion has been brought into the treatment of mediaeval ideas and civilisation by the fact that many writers have not been at pains to distinguish between individual speculation and controversy and the normal judgment of the ordinary intelligent man.

It is, of course, true that often the most extravagant or paradoxical phrase covers the profoundest and most fruitful thought, that the eccentric and the insurgent often represent the future, while the normal man only represents the present, and we shall endeavour to recognise and to set out the value of even the most paradoxical and eccentric phrases and movements, of which the Middle Ages were indeed fertile. But if only to find the due place and to interpret the full significance of the ideals of these thinkers, it is well to begin with the most sober and matter-of-fact aspects of our subject.

In this volume, then, we propose to deal with the Boman and the Canon Law of the Middle Ages to the middle of the thirteenth century, leaving the new legal systems of national or feudal law to be dealt with in closer relation to the actual political history of these centuries. We deal, that is, with the study of the Boman Law down to the middle of the thirteenth century, taking the compilation of the great gloss by Accursius in the middle of the thirteenth century as the limit of our present inquiries; and in the same way we deal with the Canon Law down to and including the publication of the Decretals of Pope Gregory IX.

PART I.

THE POLITICAL THEORY OF THE ROMAN LAWYERS OF THE MIDDLE AGES TO ACCURSIUS.

CHAPTER I.

THE THEORY OF LAW. *JSQ VITAS* AND JUSTICE.

WE have seen that there is but little trace of any influence of the Boman jurisprudence on the political theories of the ninth century. This does not mean that the Roman Law was exercising no influence in Western Europe during this period. A considerable part of the

population of the Carlovingian Empire lived under the rule of Roman Law in some form or another; the people of Southern France were governed mainly by adaptations of this, and in Italy itself, the native population, as distinguished from the Lombard and Frank, lived under Roman Law. During this period, as well as later, the Roman Law was actually regulating the life of a great number of persons, and the influence of this system of law upon the laws and customs of the barbarian races is among the most important of historical subjects. We cannot, however, now consider this in general; we have to inquire how far the Roman jurisprudence affects the theory of politics in the Middle Ages—that is, how far, when men began to reflect on the nature and principles of political institutions, they were influenced by the theory as embodied in this jurisprudence. Men may long be governed by a system of law, or by a particular political organisation, before they ask themselves what are the principles of political or social relations represented by their legal system. Some time or other they ask the question, and then political theory begins.

It was once thought that there was no such thing as a systematic study of the Roman Law until the eleventh century, and the beginning of the great law school at Bologna. It was once thought that Irnerius was the first to study the Roman Law systematically, and that the foundation of the great school of Bologna was also the beginning of the scientific study of the Roman Law in the Middle Ages. It seems clear now that these notions were erroneous, and that the more or less systematic study of Roman Law had never died out in Western Europe. There is some reason to think that the Law School of Rome had always continued to exist, and that Irnerius himself was a pupil of this school. There are traces of a school at Ravenna, and it is very possible that there may have been yet other schools of Roman Law in Southern France. A certain amount of literature has been preserved, or rather, we should say, the fragments of a literature which belongs to a period antecedent to, or at any rate to represent traditions independent of, the great school of Bologna. Such is the work known as ‘*Petri Exceptiones Legum Romanorum*,’ a little handbook of Roman Law; such also are a number of treatises and fragments collected by Professor Fitting in his ‘*Juristische Schriften des fruheren Mittelalters*.’⁵ It is, indeed, very largely to Professor Fitting that we owe our knowledge of this obscure but interesting subject. Whatever may be the exact facts about this, we shall see that there are important materials for our purpose not only in the writings of the great school of Bologna, but in writings which may be earlier than, and are at least independent of, the tradition of Bologna.

The political theory of the mediaeval civilians is directly founded upon that of the law books of Justinian, and no doubt they often do little more than restate the positions laid down by the great jurisconsults of the second and third centuries or the editors of the sixth; but the world had greatly changed, and the mediaeval civilians, even when they were

most anxious to restate ancient law, were yet influenced by these changes and sometimes aware of them. They did much more than merely repeat the phrases of the ancient law, they endeavoured to explain what was difficult, to co-ordinate what seemed to be divergent or contradictory, and to show how these ancient principles or rules could be brought into relation with the existing conditions of society.

We must refer to our first volume for a discussion of what seem to be the most important aspects of the political theory of the Roman Law. But briefly we may say that

the most important aspects of this are to be found in its treatment of the nature of law, in its theory of equality and slavery, and in its conception of the source or origin of political authority. We shall see that the political theory of the mediaeval civilians touches other subjects of importance, and especially the relations of Church and State, of Canon Law and Civil Law; but we must begin our consideration of their political theory by considering their treatment of the former subjects. Of these, the first, and perhaps the most important, is the theory of law. Like the ancient lawyers, the medieval civilians think of law in the largest sense as the expression of the principle of justice; the positive law of any one state is only the application, by the authority of some society, of this principle to the actual conditions and circumstances of a particular place and time. We must, therefore, begin by considering their theory of justice and *aquitas*, and the relation of these to *jus*.

Jus, according to all these writers, is derived from justice and *wquitas*, while some of them distinguish between *cequitas* and justice. These terms, and their relations to each other, are defined by the author of an anonymous fragment which Professor Fitting has thought to be earlier than the school of Bologna: he defines *cequitas* as ⁴⁴ *rerum convenientia quae in paribus causis paria jura desiderat*," and adds that God is *cequitas* itself; when this temper is fixed in a man's soul and will, it is called *justitia*, while justice expressed in the terms of law, whether written or customary, is called *jus*.¹ In this passage we have four important points: the definition of *cequitas*, the relation of this to God, the relation of justice to *wquitas*, and the relation of *jus* to justice.

The definition of *wquitas* would seem to be one generally adopted by the mediaeval civilians. It is probably related to a phrase of Cicero's: "*Valeat sequitas quae paribus in causis paria jura desiderat*,"² and we find it again in the introduction to a *Summa* of the *Institutes*,³ in the *Summa* Codicis known as the "*Summa Trecensis*," which Fitting attributes to the great Irnerius himself, the founder of the school of Bologna,⁴ in the work of Placentinus, the founder of the School of Montpellier, in his work on the *Institutes*,⁵ and in the work of Azo on the *Institutes*.⁶

We next consider the theory of the relation of justice to *(z)quitas*. In the passage of the Prague fragment which we have just quoted, justice is defined as *Aquitas* translated into will, justice is a quality of will or purpose. This is the normal theory of these civilians. It is no doubt derived directly from Ulpian's definition of justice as "*constans et perpetua voluntas ius suum cuique tribuendi*."⁷ We may cite as illustrative of this a gloss of Irnerius on the Digest, a phrase ■ of the *Summa Codicis* attributed to him, and a phrase of Placentinus' work on the *Institutes*.¹ Justice is regarded as a quality of will, the will to secure and maintain *CB quit as** The definition of *wquitas* is no doubt partial and one-sided; *wquitas* may be taken, perhaps more normally, as the principle which distinguishes between a general law and its application to particular circumstances. We do not here deal at all with the general theory of the subject, but only with what seems to be the tendency of these civilians to relate the conception of *cequitas* to the abstract principle of justice in these formal definitions.

But it must now be observed that these conceptions have their first truth, their original being, in God Himself. "God is *aquitas*," the author of the Prague fragment says, and justice is primarily a quality of God's will. This is very clearly put in a little treatise on justice, whose date is uncertain, but which is regarded by Fitting as being either

antecedent to or independent of the school of Bologna. It is the Divine will which we properly call justice, it is that will which gives to every man his *jus*, for it is the good and beneficent Creator who grants to men to seek, to hold, and to use what they need, and it is He who commands men to give such things to each other, and forbids men to hinder their fellows from enjoying them.² We find the same conception in another passage of the Prague fragment, and in an abbreviation or epitome of the Institutes which is of uncertain date.¹

In order to appreciate these definitions and principles more completely, we turn to the full and formal treatment of the subject in two of the great civilians of Bologna, in Placentinus and Azo. We have already quoted some sentences from Placentinus' "Summa" on the Institutes, which deal with the nature of *aquitas* and justice; these are only parts of an extended discussion of the subject. He first defines the nature of *wquitas*, and then says that justice resides in the minds of just men, we ought to call a judgment *aquum*, while the man or the judge should be called just. He then quotes a definition of justice from Plato and another from Cicero, but it is the definition of Justinian, that is, of Ulpian in the Digest (i. 1.10) and Institutes (i. 1.1), on which he dwells, and from which he derives the principle that it is the will which makes an action good or evil; he adds that justice is not only a good will, but a good will or temper which is constant and enduring?

The statement of Azo is extremely interesting, for he draws out at length the conception of justice as being primarily a quality of God, and secondarily of man.¹

Justice is then a quality of will, it is the will to carry out that which is in accordance with *cequitas*, and this is found first of all in God, and secondly in man. Neither God's will nor man's determines the nature of justice, but justice is the conformity of the will of God and man with that which is a *quum*, the conformity of the will of God with that which is His own nature, for in the phrase of the Prague fragment, God is *cequitas**

■ The conception of justice in these writers is profound and significant. We shall presently deal with the interpretation of their conception into the practical theory and criticism of law, and we shall then see how significant these conceptions really are. We may find a fitting conclusion for their treatment of justice in a passage from the "Quaestiones" of Imerius, a passage which describes the vision of the ineffable dignity of Justice surrounded by her daughters, Ratio, Pietas, Gratia, Vindictio, Observantia, and Veritas, and holding *JSquitas* in her embrace, while she deals with the "causes" of God and men, and, rendering to every man his due, preserves unharmed the society of men?

CHAPTER II.

THE THEORY OF /O.

WE have considered the nature of justice as it is thought of by the civilians; we must now turn to the theory of *jus*—that is, the whole system of law. The author of the Prague fragment defines *jus* as being justice embodied in a command or law, whether written or customary,¹ and in another passage, of which we have quoted a few words, he describes *jus* as having its origin in *justitia*, and flowing from it as a stream flows from its source; justice is the will or purpose to give every man his due, a will which is perfect and complete in God; justice is this will unexpressed, *jus* is the expression of this will. But justice also differs from *jus*, for the former is constant, unchanging, while the latter is variable: this is due to the varying nature of the circumstances to which it has to be

adapted? This conception of the relation of *jus* and *justitia* represents, we think, the normal judgment of these civilians. Placentinus repeats the statement that *jus* is derived from *justitia*, and adds that *justitia* is so called because all *jura* have their foundation in it.¹ The same conception is again stated by Azo, who adds that whatever *justitia* desires, that *jus* pursues.²

These are significant phrases, but it may be thought that after all they are only phrases which had little practical significance. That is not the case; but rather it is certain that the mediaeval civilians were clear in their judgment that laws which are unjust must be modified and brought into accordance with justice.

It is, indeed, maintained by some that before the development of the great school of Bologna, the attitude of those who taught or practised the Roman Law was one of much greater freedom than later. It is certainly interesting to notice the very emphatic phrases of some of the early writers of the school of Bologna, or of those who stood outside it. One of the most remarkable of these is contained in 'Petri Exceptiones Legis Romani? In the prologue to his work he uses a very emphatic phrase, expressing his determination to repudiate anything in the laws he was handling which might be useless or contrary to equity.³ In another passage he lays down the principle that in special cases, affecting in a high degree the public or private convenience, or for the purpose of putting an end to quarrels, a judge should be allowed in some measure to depart from the law.⁴

It is significant that the author of the ⁴ *Summa Codicis*, attributed to Irnerius by Fitting, takes up the same position, and clearly lays it down that laws which are contrary to equity are not to be enforced by the judge.¹ A similar view is expressed in an extremely interesting discussion by *Bubgarus*, one of the four doctors, the immediate successors of Irnerius in the school of Bologna. He is commenting on a phrase of Paulus, ⁴⁴ *In omnibus quidem, maxime tamen in jure, sequitas spectanda est.*" He urges that this means that we must always consider carefully whether any particular law (*jus statutum*) is equitable, if not it must be abolished. The judge must prefer equity to strict law—e.g., strict law enacts that all agreements must be kept, but equity declares that certain agreements, such as those made under false pretences, or through fear or violence, or by minors or women, are not to be kept; the judge must decide such cases on the ground of equity.² It is clear that the civilians who have been cited looked upon *aquitas* as a test which should be applied to actual laws, that if these were not conformable to *aquitas* they ought to be amended, and it seems clear that some of these civilians thought that even the judge in deciding cases must correct the application of actual laws by reference to the principle of *cequitas*.

Here we come, however, to an ambiguity in the meaning of (*Equity* of which we must take account. So far we have considered the term defined as some essentially fair and reasonable adjustment of things, a principle which finds expression in the just will to give every man his due. We have now to observe that the term *wquitas* is also used, by some at least of these civilians, in a much more technical sense. All the civilians agree with such a statement as that of *Bulgarus*, but they differ greatly as to the sense in which *cequitas* is to be understood.

The 'Brachylogus' draws attention to the apparently contradictory statements of the Code on the relations of the magistrate to *aquitas*. In one place it is laid down that *wquitas* and justice are to be held superior to strict law, while in another, all cases involving such a divergence of law and *aquitas* are said to be reserved for the Emperor's

decision.¹ The author, who provides no solution of the question which he has raised, evidently feels that the relation of the magistrate to *aquitas* was not easy to determine.

A gloss of Imerius, published by Pescatore, seems clearly to teach that in the case of a conflict between *jus* and *wquitas* the prince alone can intervene.¹

One school of civilians seems to have held to the view, possibly the older view, that the judge must decide cases in accordance with, the abstract principle of *csquitas*, even against the written law; but another school maintained that the *c&quitas* which the judge was to obey was of quite another kind. In the collection of disputed questions compiled by Hugolinus, we have a passage which makes the nature of the discussion clear. The question raised on Cod., iii. 1. 8 was the following—Whether unwritten equity was to be preferred to strict law! Some said that the passage meant by “justice” that which was established by law (*lege*), and not that which a judge might consider to be justice; and they quoted Nov., 18. 8 to show that the strict law must ■ be preferred to such personal judgments. Others said that justice, whether written or unwritten, was to be preferred to strict law (*jus*), and they referred to Dig., i. 3. 32 and 33 in support of this position.² Savigny has drawn attention to an observation of Odofredus which seems to imply that Martin, another of the four doctors, had often appealed to an unwritten equity, even against the written

law.¹ Azo, in his treatise on the Institutes, shows that he understood by the *aquitas* which was to override the written law a written *cequitas*—not some principle which a man may chance to find in his heart.² In another place Azo puts the same view with great clearness: it is certain, he says, that *c&quitas* is to be preferred to strict law—that is, an *cequitas* devised by law, not by any one’s private judgment.³

When, therefore, we consider the account by Hugolinus of the dispute in the law-schools about the meaning of *cequitas*, and then compare the position of Azo with that of the ‘*Summa Trecensis*,’ and the author of the ‘*Exceptiones*,’ we become clear that there was a real uncertainty about the meaning of *cequitas* and its relation to strict law; and we shall be inclined to agree with Fitting that there is some reason to think that the early Bolognese and the pre-Bolognese civilians may have held a more free position with regard to the written law than the later members of the school of Bologna. For our purpose—at least for the present—it is sufficient to observe that the controversy brings out the great importance of the theory of justice, or *cequitas*, as the source and the test of law; and it is clear that even those who might not agree with the principle that the judge should decide according to his own opinion as to what might be just, yet held firmly that an unjust law must be abrogated. Irnerius, in the ‘*Qu&stiones*,’ speaks of the many honourable men who diligently see to it that if anything in the law is found contrary to *cequitas*, it is cancelled;¹ and in another treatise he says that the authority of the law is only gladly accepted when it is equitable.²

Jus is, then, according to the civilians, derived from *justiia*—is the manifestation of *justitia*; but the question then arises whether this manifestation is complete and adequate. Justice is the will to render to every man his due. Is this good will perfectly and constantly represented in the actual body of law or *jus*? Some of the civilians, at least, clearly recognise that the representation is not complete — that the embodiment of the good will is not perfectly adequate to the good will itself.

But before we deal with this, another question arises, that is, whether justice in man is a perfect reproduction of justice in God, of the final justice. Some at least of the writers

on the Civil Law are very clear that this is not the case. There is a very interesting passage in that anonymous treatise, ⁴ *De Justitia*,⁷ to which we have already referred, bearing upon this. The author makes a very clear distinction between the divine and the human justice, although he holds that the latter is also by the divine testimony declared to be divine. He urges that there is a great difference between such a divine law as that of the Gospels which bids a man turn the left cheek to the smiter, and the human law which permits men to oppose violence to violence. The author looks upon human justice as incomplete and inadequate, but he argues that it is a preparation for the divine or perfect justice, and he regards the relation between the law of the Old Testament and that of the New as illustrating the conception of an imperfect law, and an incomplete conception of justice, preparing the way for the perfect.³

There does not seem to have been much discussion of this point among the civilians, but the distinction seems to have been familiar to them. Roger clearly refers to it in discussing the nature of justice and *jus*, when he speaks of that aspect of justice which allows a man to return a blow, as being unjust when considered by itself, but just when compared with injustice;¹ and Azo does the same when he speaks of the second form of equity which forbids you to injure your neighbour unless you have been injured, and says that this is inequitable when compared with the highest equity, which consists in turning the other cheek to the smiter.¹

When we turn back, then, to consider the relation of *jus* to justice we shall not find it surprising that these jurists hold that no system of law devised, however carefully, by man, can be a completely adequate manifestation of the principles of the Divine justice. This conception is very clearly illustrated in two passages of works which do not apparently come from the School of Bologna. The first is from that Abridgment of the Institutes to which we have before referred. Justice is said here to have many qualities in common with *jus*, but also they differ, for God is the author of justice, while He has made man the author of *jus*. Justice has also a wider scope than *jus*, and the author refers to an imaginary case, whether the property of Lazarus, which had upon his death passed to his sisters, should have been restored to him. *Jus* could say nothing on such a case, but justice would find the answer, and thus, he says, justice will always find a solution for new cases for which *jus* could not make provision.²

A similar conception is expressed by the author of the Prague fragment in the passage already quoted, when he says that in justice *jus* has its beginning, and that justice is the will to give every man his due: this is complete and perfect in God, in us it is called justice⁴⁴ *per participationem*”; justice differs from *jus*, for justice is constant, *jus* is variable, though this variability lies in the nature of the things with which it is concerned, rather than in itself.¹

We have thus indicated some of the most important elements in the theory of the relation of *jus* to *justitia*, but the conception of *jus* can only be adequately considered in relation to the more or less formal definitions and discussions of it which we find in the treatises of the great jurists. We may take these in their chronological order, and begin with an interesting discussion by Irnerius of that phrase of Paulus on which we have already commented in our first volume: “*Jus pluribus modis dicitur: uno modo, cum id quod semper sequum ac bonum est jus dicitur, ut est jus naturale. Altero modo, quod omnibus aut pluribus in quaque civitate utilis est, ut est jus civile*”² (Dig., i. 1.11). Irnerius compares with this the phrase of Ulpian: “*Jus est ars boni et sequi*” (Dig., i. 1.

1), and asks how these two conceptions can be reconciled with each other. He replies by pointing out that the phrase of Ulpian assumes that *jus* represents the authority of him who ordains it, but also the principles of *aequitas*; but the word *jus* is also sometimes used to describe a form of authority which does not necessarily represent *aequitas*, as, for instance, an unjust judgment of the Praetor. Irnerius explains that this is called *jus* because the Praetor ought to give a just judgment. The distinction between the ⁴⁴ natural " and the ⁴⁴ civil " *jus* is related to this double sense of *jus*, and also to the fact that the ⁴⁴ civil " *jus* often has reference only to some particular place or time, while the " natural " holds always and everywhere.³ This is only a brief summary of the discussion: how far Irnerius' interpretation really corresponds with the meaning of Paulus and Ulpian may be doubted, but the passage serves to show very clearly how strongly the mediaeval civilians insisted upon the conception of law as representing the principle of justice, and as deriving its character from this fact. This is still further illustrated by another passage in the same treatise.¹

From Irnerius we turn to Placentinus and consider his definitions of *jus*, *lex*, and *jurisprudens*. All *jura* flow from *justitia*, as the stream from the source. But *jus* may be used in many senses. It may be called an art, and it has then to do with the good and equitable; but it may also be used for the place where *jura* are declared, or for a relationship of blood, or it may be equivalent to *potestas*, as when a man is said to be *sui juris*. It may also be used for the form of an action, or for the rigour of the law, or " *equivoco* " for broth (*pulmentum*). But *jus* is in the first place the art of that which is good and equitable. There are three precepts of *jus*—to live honourably, not to injure another, and to give every man his due. *Lex* is a general command to do all honourable things, and a prohibition to do the opposite. *Jus* is that which the law declares, while *lex* is the declaration of *jus*. *Jurisprudens* is the knowledge of what is just, what is unjust, what is unlawful in divine and human and legal matters. Justice is a virtue, *jurisprudens* a science?

The treatment of the subject by Azo is very similar: it would indeed appear probable that it is based upon Irnerius and Placentinus. He also describes *jura* as flowing from *justitia*, as the stream flows from its source. *Jus* is derived from *justitia*; but also *jus* may be used in various senses. It is interesting especially to observe that he gives the same explanation as Irnerius of the sense in which the Praetor is said to declare *jus*, even when his sentence is unjust. Azo concludes with a discussion of the relation of *jus publicum* and *jus privatum*, and with the statement of the tripartite nature of *jus privatum* as consisting of Natural Law, the Law of Nations, and Civil Law.¹

Our examination of these discussions will have made it plain that the mediaeval civilians maintain the doctrine that law (i.e., *jus*) is the embodiment of the principle of justice, that they are clear that all systems of law represent the attempt of man to apply the principle of justice to the circumstances of human life. Justice is the source of law: from it law proceeds, by it law is to be tested, in accordance with it law is to be made or to be changed. In the first volume of this work we have endeavoured to point out that these are the principles laid down by the great jurists of the second and third centuries; while they are restated, and to some extent developed, by the compiler of the Justinian Institutes in the sixth century. We have now endeavoured to show that the mediaeval civilians not

only recognise these principles, but develop and expand them. To these writers law is not the expression simply of the will of the sovereign—if we may use a phrase which belongs to a later time,—but rather all systems of law represent the attempt to apply the fundamental principles of justice to the actual conditions of human life.

CHAPTER HL

THE THEORY OF NATURAL LAW,

WE have considered the nature of *Jfflquitas* and Justice, and their relations to *jus*—that is, the system of law. We have now to approach the question of law in another fashion, to consider the nature and significance of a classification of law which the medieval civilians inherited from some parts of the Digest and from the Institutes of Justinian. Private law had been described by Ulpian and by the compilers of the Institutes as tripartite, as consisting of “Natural Law,” the “Law of Nations,” and the “Civil Law.” We have now to consider the treatment of law under the terms of this tripartite description.'

We must begin by observing that all medieval civilians, whether of the school of Bologna or not, accept the tripartite division: it is needless to cite passages to establish this, as it is stated or implied by every writer who deals with this aspect of law. We quote two phrases to illustrate the matter, one from an anonymous work which is thought by Fitting to belong to the eleventh century,—to be antecedent, that is, to the school of Bologna,—the other from Placentinus.¹ As far as we have seen, there is no civilian down to the time of Accursius who rejects or throws doubt upon the propriety of the classification. We must consider what they understand it to mean, and what is its significance. We

begin by considering the meaning of Natural Law, its definition and relations.

There is some uncertainty as to what exactly the great jurists of the second and third centuries understood by the phrase. Ulpian, in one well-known phrase, defines Natural Law as something very like an animal instinct, rather than a rational apprehension and judgment.¹ But, as we have endeavoured to point out, an examination of all the important references to the subject leads us to think that it is doubtful whether even Ulpian intended this as a complete treatment of the subject—in other passages he seems to come much nearer to the conception of Cicero: and the references of the other writers of the Digest and Institutes, and of St Isidore of Seville, seem to show that the jurists in general never accepted the theory of Ulpian. We have endeavoured to point out that the legal theory probably held the Natural Law to be the body of principles apprehended by the human reason as governing life and conduct, principles which are recognised as always just and good.³ This, as we have pointed out, is the sense in which the phrase was understood not only by Cicero, before the lawyers,³ but also by the Christian Fathers.⁴ But we must refer our readers to our first volume for the complete exposition of our judgment upon this subject.

In what sense is the phrase understood by the medieval civilians whom we are considering? In the first place, we must observe that they repeat from the Digest and the Institutes Ulpian's description of Natural Law, and sometimes they seem to agree with it. We may take as an example Placentinus' commentary on Ulpian's definition. Nature, he concludes, is here equivalent to God, who has caused all things to be brought forth. The law of nature is in one aspect permissive, as regards, for instance, the begetting of offspring; in another, obligatory, with respect to the bringing up of that which is begotten: this law is related to all animals.⁶

But this passage if taken alone would give us a false impression of the standpoint of these civilians. We get a good deal nearer their position in the discussion of the meaning of the *jus naturals* by Azo in his work on the Institutes. *Jus naturals*, he says, can be described in several fashions; it may be described as the instinct of nature, and then it has reference to all living creatures, or it may be described as the *jus commune* created by man, and in that sense it corresponds with the *jus gentium*, or yet again, it may be described as that which is contained in the Mosaic Law and the Gospel, or as that which is *cequissimum*, or again, it may be used for that law which protects agreements, and in this sense it is equivalent to the Civil Law?

Azo enlarges the scope of the possible sense of *jus naturals*, while in the last sentence he suggests an important distinction between the first meaning he has mentioned and the other forms—namely, that in the first sense it describes a physical or sensuous instinct; in the others it has to deal with the reason. It is important to observe this significant distinction between Natural Law, as something related to instinct, as in Ulpian's definition, and Natural Law as related to Reason, as in the other forms of law mentioned by Azo.

We should observe in this passage a phrase which is of great importance, the words which identify the *jus natural#* with the Law of Moses and of the Gospel. We shall have to consider this in connection with the Canon Law. In the meantime we may notice that the phrase is not isolated. Azo in another work refers to the *jus natural# decafoli*,¹

The formal definitions of the *jus naturals* leave us in doubt whether the civilians had arrived at any clear view as to the sense in which the phrase should be used; we may reasonably conclude that the ambiguity in the definitions of the 'Corpus Juris'⁹ hampered them so much as to make it difficult for them to come to any definite conclusion. The Canon Law presents in this respect a noticeable contrast with the Civil Law. The civilians cannot make up their minds to choose between the various senses in which the phrase might be used, while the canonists, as we shall see, decided clearly and definitely in favour of a particular usage. But on the whole it seems true to say that while the civilians hesitated to commit themselves in definition to any one sense of the phrase, they do very constantly mean by the *jus natural#* that body of moral principles which is always and everywhere recognised by men's reason as binding—that is, they do constantly use it in the sense in which it is sometimes used in the 'Corpus Juris Oivilis,' and regularly in the Canon Law. With all their hesitation about definitions the civilians assert very emphatically that the *jus natural#* is immutable, and not to be overridden by any other system of law. It is a graver fault to be in error as to the Natural than as to the Civil Law;² no one can be allowed to plead ignorance of it.³ Natural Law is not on the same level as other laws, but is in some sense supreme, not normally to be overridden by other laws, not to be abrogated except in certain rare cases.¹ The principle is well brought out by a passage in Hugolinus' collection of questions disputed among the jurists, in which he puts together the views of different lawyers on the question how far the emperor's rescripts, obtained contrary to the existing law, were to be accepted in the courts. We shall have to return to the discussion of this subject when we deal with the theory of the authority of the ruler. In the meanwhile it is enough to observe that, while some jurist is represented as maintaining that imperial rescripts, unless they have been obtained by falsehood, override the Civil Law, he is also represented to have said that if these rescripts are contrary to the Natural or the Divine Law, they are to be repudiated.

The same principle is here said to have been held by Albericus? Placentinus lays down a similar view in his work on the Institutes, in discussing the legislative power of the emperor? Azo also held that a rescript of the emperor which is contrary to Natural Law is void.⁴ It is clear from such passages as these that the mediaeval civilians have carried on from the Institutes the conception that Natural Law represents the immutable principles by which the world is governed, principles apprehended by men but not controlled by them. The civilians have learned from the ⁴ Corpus Juris ' the same conception as that held by the canonists.

It must, however, be noticed carefully that these phrases do not by themselves furnish us with a complete or adequate exposition of the theory of Natural Law held by these civilians. For while in these sayings we have the statement of the supreme and immutable character of Natural Law, in other places we find the jurists recognising very clearly that as a matter of fact there was much in the actual law and in existing institutions which was contrary to Natural Law. We have just cited a passage from Bulgarus, in which he asserts that *naturalis ratio*—i.e., in this case, *jura naturalia*—cannot be annulled by Civil Law, but we should now observe that the *jura cognationis*, which belong to the *jura naturalia*, are as a matter of fact abrogated by *capitis diminution*. This is expressed in more general terms in a treatise which may very probably be earlier than Bulgarus, in an appendix to ⁴ *Petri Exceptiones Legum Romanorum*.²

The truth is that the mediaeval jurists, while they say that Natural Law is immutable, also maintain that certain rules or institutions of the Civil Law, which they recognise as legitimate, are in some sense contrary to Natural Law. It will be well therefore to consider their theories of certain institutions, and when we have done this, to ask how far these represent a coherent system of thought.

CHAPTER IV.

THE THEORY OF SLAVERY.

THE mediaeval civilians, like some of the great jurists of the Digest and Institutes, are involved in what seems at first sight an inconsistency and a self-contradiction. At one moment they speak of the *jus naturals* as immutable and perpetual; at another they describe and assent to institutions which they say are contrary to the *jus naturals*, such as the institutions of slavery and property. Some jurists of the Digest lay down very clearly the principle that slavery is contrary to nature or natural law, while at the same time they accept the institution. It is the same with the mediaeval civilians, and indeed in general their views are directly taken from the ancient jurists. The author of the '*Brachylogus*' puts together the phrases of Florentinos and Ulpian, which assert that slavery is contrary to nature, and that by natural law all men were born free.¹ Irnerius is quoted by Odofredus as classing slavery among those things in respect of which the Civil Law adds to or takes away from the *jus commune*;² and there is an interesting discussion of the subject in another gloss on the Digest by the same jurist. Liberty, he says, belongs to the Natural Law; it exists both in fact and by law. In fact, it is interfered with by force, in law by another law,—for the law of nations is contrary to the law of nature, just as the *Lex Falcidia* was contrary to the earlier law. The slave has no doubt *naturalis facultas*, but he has not the *facultas* of doing whatever he wishes, for his *faodta* is dependent upon the will of his lord.⁵⁷¹ Bulgarus, in a passage to which we shall have to recur, asserts that slaves are by Natural Law free, and all men are equal?

Placentinus quotes and comments upon the saying of Florentinus? Hugo- linns describes freedom as the primitive condition of man?

These quotations will suffice to make it clear that the jurists of the twelfth and thirteenth centuries take over from the ancient lawyers the theory that in some sense slavery is contrary to nature or Natural Law, and yet that it is an institution of the *jus gentium* or of the *jus civile*.

We find that is the contrast between the natural and the conventional order of society, illustrated by the institution of slavery, just as it is in the ancient lawyers and in the Christian Fathers. We must presently consider how far the same thing is true in the case of these civilians with regard to the institution of private property. But before doing this, it will be convenient to consider a little further the principles of the civilians with regard to the position of the slave. As far as we can judge, these do not in any important point depart from the principles of the ancient law, but perhaps they carry a little farther that tendency to modify the condition of slavery which we find in the '*Corpus Juris*'—at any rate, they restate some of the phrases which exhibit this tendency.

The author of the '*Brachylogus*,' Bulgarus, and Azo, all restate the principle of the *jus civile*—that the slave has no *persona*.¹ But Bulgarus points out that, under the *jus naturalis*, the slave is under "obligations," and others may be under "obligations" to him, and these obligations can be enforced under the Praetorian law. The slave cannot indeed sue or be sued in civil cases, but he can both sue and be sued in criminal matters ; he can proceed even against his master in such cases, and can appear against him to maintain his own liberty and in some other matters.²

When we turn to the subject of the limitation of the rights of masters over their slaves, we find that in the main these jurists restate the position of the older law. Placentinus, for instance, sums up its most important provisions in one passage founded on *Inst.*, i. 8. The master could once ill-treat or kill his slave at his pleasure, now he may not do any of these things without definite cause, and even if he has cause, if he kills his slave, he will be punished as though he had killed another man's slave or a freeman, and he may not ill-treat him beyond reasonable measure. If he does this, the slave is to be compulsorily sold? Roger puts one point very clearly when, in commenting on a rescript of Constantine (*Cod.*, ix. 14), he explains that the master has the right to punish his slave, but if in doing so he wilfully kills him, he will be liable to a charge of homicide.² Azo, commenting on *Inst.*, i. 8, repeats the view of Placentinus and the Institutes? and does the same when commenting on *Cod.*, ix. 14, but with some modifications, and, as he says, differing from Placentinus on one point. The master, he says, who kills his slave without cause and wilfully, is liable to the same charge as though he had killed a freeman ; but if, he says, the master punish him reasonably, then he is not liable to any punishment, and he adds that

Placentinus had stated a contrary opinion. This is not the case in Placentinus' treatise on the Institutes just quoted, but it may be so in the treatise on the Code, or in some gloss; it would be interesting if indeed Placentinus had expressed this view, but it seems improbable.¹ It is important to notice that Placentinus says that a master killing his slave without cause will be punished as though he had killed a freeman, and that Azo says the same. This seems to be stronger than either *Inst.*, i. 8, or *Cod.*, ix. 14.

The medieval jurists again follow the Code in recognising the Churches as places of sanctuary. Boger is clear that a slave taking refuge in a church must be surrendered to

his master, but only when the latter takes an oath that he will not punish him,² while Azo holds that those who have fled from their masters to the church, in order to escape excessive cruelty, are to be sold, and not restored to him.⁸

With regard to the question of the ordination of a slave, Azo reproduces the provisions of Novel 123. 17. Slaves ordained with their master's consent are free; if ordained without the knowledge of the master he can within one year prove that the man is his slave, and reclaim him? With regard to the reception of slaves into monasteries, Azo summarises the provisions of Nov. 5, 2. If any unknown man enter a monastery, he is not to receive the habit for three years, and if within that time his master appears and proves that he is his slave, or *ascriptitus*, or *colonus*, and that he has fled to the monastery to escape his work, or because he had committed some theft or other crime, he is to be restored to his master, on an oath that he will not punish him. But if after three years he has received the habit, no claim is to be entertained.²

It remains to notice some statements by these jurists on the position of the *ascriptitus*, and the distinction they draw between his position and that of the slave. Irnerius, commenting on Florentinus' definition of slavery in Digest, i. 5. 4, says that the *ascriptitus* is not subject to the domin'ion of another man, but is the slave of the estate (glebe) Z Placentinus is more explicit, and says that in his judgment the *ascriptitus* is *Uber*, although he is *servus glebe** And Azo is even more dogmatic, and maintains that the *ascriptitus* is really free (*Uber*), although he is bound by certain kinds of *servitium*,¹ and he repeats the provision of the Novels that he can be ordained without his master's consent, but must in that case continue to fulfil his agricultural task?

CHAPTER V.

THE THEORY OF PROPERTY.

It has been pointed out in the first volume, that while the legal and patristic theories of Natural Law and natural equality are related to the same philosophical principles, there is a difference between them as to the nature of property and its relation to the Natural Law. It is not indeed certain whether all the jurists held the same opinions, we have no information as to the opinion of Ulpian, and one passage of Hermogenianus suggests that he may have held that property belonged to the *jus gentium*, and not to the *jus natural*#, but it is clear that many of the great jurists conceived of property as a natural institution.¹ The Fathers, on the other hand, clearly held that property was not an institution of nature, that it belonged to the state of convention as opposed to the state of nature,² and it is fairly clear that they had learned this doctrine from the philosophers like Seneca.⁸ This doctrine assumed a legal form in the *Etymologies* of St Isidore of Seville; his phrase is perhaps ambiguous, as we have pointed out,⁴ but it was in the Middle Ages undoubtedly taken to mean that under the Natural Law all property was held in common. It is highly probable that this phrase of St Isidore is derived from some juristic source, for it is most probable that his legal chapters are based upon some law-book which we have lost.⁵

When we now turn to the theory of property in the mediaeval civilians, it is extremely interesting to find that they waver between these two traditions. Some of them simply repeat the general legal doctrine that property is an institution of natural law; others dogmatically assert the patristic theory; while others again seem to hesitate between the two views.

We begin with some references to the subject in those works which are either earlier than the school of Bologna, or at least independent of it. Conrat and Fitting have published a gloss on the Institutes which they consider to be entirely independent of Bologna; a passage in this speaks of things which are acquired by the civil law or by the natural law.¹ Fitting has published, a little work which he considers to belong to the eleventh century, and to be of North Frankish origin, consisting of definitions of legal terms. This explains *possessio* in the terms of Digest, xli. 2. 1, and then adds that it is either natural or civil.² Another treatise, the ' *De Natura Actionum*/' speaks of the *accio in rem* to which a man has the right, who has *dominium* by civil or natural law;³ and it is interesting to notice that the author has misquoted the passage in the Digest which he is citing— unless indeed his text was different, for Paulus, in this passage in the Digest, speaks of those who have *dominium* by the law of nations or by civil law. Fitting⁴ has suggested that Placentinus is correcting this treatise, when in his work ' *De Varietate Actionum* ' he states that *dominium* does not belong to the *jus naturale*;⁵ we shall recur to this presently. The ' *Brachylogus* ' enumerates six methods by which men acquire *dominia* under Natural Law; clearly the author of the treatise had no doubt that the institution of private property belonged to it.¹

When we turn to the great jurists connected with Bologna, we find that they are divided—some definitely taking one view, while others hold the opposite one, while some speak in terms which are a little difficult to interpret.

Irnerius, in a gloss on the Digest, lays down the principle that there is no private property by nature;² while in another gloss he says that private property is one of those institutions which illustrate the meaning of the saying that by the civil law something may be added to or taken from the *jus commune*, and that in the case of property this had been done by *iniquitas*.³ These statements seem very dear and unequivocal. Private property is a conventional, not a natural, institution; and Irnerius seems to mean that it is the result of some vicious disposition, as Seneca and the Fathers had held. We should indeed be inclined to suspect the influence of the patristic tradition. In the ' *Summa Codicis*,' which Professor Fitting ascribes to Irnerius, we find, however, a different view. In one passage the author speaks of the beginnings of *naturalis juris dominium*, and gives an account of the origin of property by " occupation," " accession," " translation," as in Institutes, ii. 1, or Digest, xli. 1; and a little farther on he says that there is a natural as well as a civil possession.⁴ In a collection of the " *Distinctiones* " of the oldest glossators, it is said that possession may be understood in two ways— either as civil, which is a matter of law ; or as natural, which is a matter *corporis vel facti*. Natural possession is described in terms suggested by the definition of Paulus (Digest, xl. 1. 2,1) as ^H *quasi pedum positio seu assessio* ⁵⁵—that is, in terms of physical occupation.¹

The jurists of the latter part of the twelfth century present very conflicting opinions. We have a report of the opinion of Joannes Bassianus, in which he is represented as having held that those things which are still common property have continued under the primeval natural law, by which all things were common? Placentinus, in his treatise ' *De Varietate Actionum*,' says explicitly that by the *jus naturale* all things are common, and there is no private property;³ and in his *Summa* on the Institutes he says that property in

things is acquired by the *jus civile* or the *jus gentium*, but not by the *jus naturale*, by which all things are common?

On the other hand, in the ⁶ *Summa Codicis* attributed to Roger we find that the author definitely holds that a man may have property in some particular thing by the *jus naturale*, while another may have property in the same thing by the *jus gentium* or the *jus civile*, and he takes the well-known example of the picture from Digest, xli. 1, and Institutes, ii. 1: the owner of the material on which the picture is painted may claim by the *jus naturale*, while the painter may claim by the *jus gentium* or the *jus civile*, and each has his appropriate method of procedure: the former has the *actio utilis*, the latter the *actio directa*.¹

The treatment of this subject by Azo is 'somewhat difficult, and it is specially complicated by the fact that while, as we have seen, he distinguishes between the *jus gentium* and the *jus naturale*, he also, as we have pointed out, holds that the phrase *jus naturale* may be used in several senses: it may be defined as something quite distinct from the *jus gentium*, but it may also in one sense be identified with it, and, in another sense' still, it may be identified with the Mosaic Law and the Gospel.⁸ In one passage of this ⁴ *Summa Institutionum* he says dogmatically that it is not by the *jus naturale*, but by the *jus gentium* or *civile*, that we obtain property: this is the more noticeable owing to the fact that the passage of the Institutes on which he is commenting says expressly that men become the owners of some things by the *jus naturale* *quod sicut dicimus appellatur jus gentium*.³ Azo evidently

means that in the strictest sense we do not obtain property by the natural law, but only in that sense in which the natural law may be identified with the law of nations. It is in this sense no doubt that a little farther on in the same passage Azo follows the Institutes in speaking of property by *traditio* as belonging to the *jus naturale*.¹ His theory is again set out in a passage of his *'Summa Codicis'*, when he defines the nature of possession, and says that it is *naturalis*, but not under that *jus naturale* which belongs to all animals, for the irrational animals cannot have the desire for possession? On the other hand, in his ⁴ *Summa Institutionum* he quotes the sentence of Hermogenianus in Dig., i. 1. 5, which speaks of *dominia distincta* as having been introduced by the *jus gentium*, but adds that he does not mean to say that *dominia* were first brought into existence by the *jus gentium*, for according to the Old Testament some things are mine, some things thine, and theft was prohibited? In another place he says that theft is forbidden by the *jus naturale*,¹ and again that it is prohibited by the *jus naturale* Decalogue and yet once more, defining the nature

of theft, he says that it is contrary to the *jus naturale* for the Divine authority warns us not to do to others what we should not wish them to do to us, and the Decalogue forbids us to steal.¹ The statement that theft is forbidden by the *jus naturale* is no doubt taken from Paulus in Dig., xlvii. 2. 1, repeated in Inst., iv. 1. 1, but Azo here identifies the *jus naturale* with the Decalogue, and we must understand him under the terms of this identification. Another passage is interesting, as illustrating the conception that one form at least of property has been created for the public convenience, but is contrary to *naturalis equitas*:² what exactly Azo meant by this phrase it is difficult to say.

If we attempt to sum up his position, we should incline to say that it is governed by the tradition of the Fathers, and possibly of the canon lawyers, to this extent, that he recognises that in some sense private property is not an institution of Natural Law; but

we must bear in mind that Azo held that the phrase “*jus natural*” could be used in many senses. He holds that private property does not belong to the *jus natural*, if you understand this in the sense of Ulpian’s definition—that is, as describing the instincts which men have in common with the other animals; but it does belong to the *jus natural* as identified with the Decalogue, and Azo seems to mean that in this sense it may be prior to the *jus gentium*.³

It is clear that the civilians of the twelfth century were divided upon the subject of the “natural” character of private property, some being governed by the formal tradition of the *corpus juris*, others being much influenced by the philosophical and patristic conceptions. It is interesting to observe that Hugolinus, who does not furnish us with any direct statement upon the subject, does suggest an explanation of the origin of some methods of acquiring private property, in terms which remind us of the Stoic and Patristic doctrine. He lays down the general principle that it is contrary to natural equity that any man should be enriched at his neighbour’s expense, and, he continues, it would seem to be contrary to this principle that a prescription of three years is enough to transfer property from one man to another. He argues that there is here no real inconsistency, for while the general principle is indeed in accordance with natural equity, the rule of prescription has been introduced by civil equity, lest the ownership of things should be uncertain.¹ The contrast between the natural and the civil equity certainly suggests the Stoic and Patristic distinction between the conditions appropriate to the state of innocence and the state of vice. Accursius says that some maintain that private property belongs to the *jus naturale*, for the divine law says, thou shalt not steal, and that when it is said that by the *jus natural* all things are common, we should understand this to mean that all things are to be shared with others. He replies that when God gave Moses the command against stealing, the *jus gentium* was already in existence? ■

It seems, then, to be clear that the mediaeval civilians account for the existence of institutions which are contrary to the Natural Law by the tacit or expressed assumption of a difference between the *primaeval* or natural state of human life and the actual conditions. They do not, indeed, draw out these conceptions in the same explicit way as the Canonists, with whom we shall presently deal; they do not reproduce in explicit terms the theories of the Stoics and the Christian Fathers; but it would seem to be evident that they assume that the Natural Law was appropriate to a natural or primitive condition which, in some sense at least, is also an ideal condition, while the actual customs and laws of men have to be accommodated to other and less perfect conditions. The Natural Law represents the supreme moral principles of human life, it represents thus an immutable ideal, but in the world as it is, men being what they are, it is impossible in all respects at once to conform to this. The actual institution and laws of human society are not in themselves always ideally perfect, but are justifiable in so far as they may tend to check and correct men’s vices.

CHAPTER VI

THE THEORY OF THE *JUS CIVILE* AND CUSTOM.

WE can now resume our consideration of the theory of law, its nature and origin. In the first chapter of this volume we have made the attempt to draw out the theory of law in relation to the principles of Equity and Justice, and we have seen that the civilians of the twelfth and thirteenth centuries regard all actual law as the application to particular times and circumstances of principles which are not created by human will or power, but

to which rather the will of men must submit. In considering the theory of natural law, we have seen that, in spite of the fact that the civilians are not always clear or consistent in their conception of this, it is yet true to say that they do constantly tend to think of the natural law as representing the immutable principles of right by which the world is governed, and to which human law must conform. That is, the theory of the civilians with regard to natural law represents in other terms the same general principles as these which are embodied in their theory of the relations of law to justice and (z)quitas.

We can therefore now turn to the theory of the Civil Law, the positive law of any one State, to the theory of its origin and the source of its authority. This will compel us to inquire first into the relations of law and custom, and secondly into the nature of political authority—that is, to examine the theory of the relation of the people and the ruler.

Before doing this, however, we must stop for a moment to deal with the meaning and use of the term *lex* in these civilians. They sometimes use the word in the technical sense of the definition of Gaius—that is, as the decree of the Roman *populus*;¹ sometimes they use it to describe the written law, as distinguished from the unwritten *mos oi consuetudo*; sometimes they use it in the most general sense for any law written or unwritten. In one of the works which is independent of the school of Bologna, we have a statement which treats *lex* as a branch of *jus*, and distinguishes it from *mos*, but neglects the distinction between the *lex* of the Roman *populus* and the *constitutio* of the Roman Emperor.² Placentinus, in a passage which we have already quoted, described *lex* as the expression of *jw*;³ in another passage he says that we may understand *lex* in the broadest sense as meaning anything that men read; in a narrower sense in the terms of the definition of Papinian; while in the strictest sense *lex* is the decree of the *populus*.⁴ Azo has set out the various senses in which the word *lex* may be used in an important passage. *Lex*, he says, is sometimes used in a stricter, sometimes in a broader sense. Strictly, it denotes the *statutum* of the Roman *populus*, made with the proper formalities; in a larger sense the word denotes any *rationabile statutum*—this is what is meant by the saying that *lex* is a sacred command, ordering what is *honestum* and forbidding what is the opposite of this; in the larger sense the constitution of the prince and the *edictum* are parts of *lex**

We can now turn to the origin of Civil Law. The medieval jurists, both of the civil and of the canon law, recognise very clearly that custom always has, or at least that it formerly had, the force of law. Azo uses a phrase which puts the principle in its broadest terms. Custom, he says, creates, abrogates, and interprets law.¹ Not all the civilians would have agreed to this statement without qualification, but they would all have agreed to it with regard to the past. All the civilians with whom we are dealing, from the earliest to the latest, whether of the school of Bologna or outside of it, held that, under certain conditions, custom either always did possess, or had once possessed, the force of law.

The author of 'Petri Exceptiones' says that what is approved by long usage has no less authority than the written law.² The Prague fragment quotes the saying of Ulpian (Digest, i. 3. 33), that long custom is wont to be recognised as *jus* and *lex*.³ The author of the 'Brachylogus' speaks of that body of law which use approves; while he adds, citing the Code, that this law is not of such weight as that it can overcome reason or law (i.e., written law).⁴ A gloss on the 'Brachylogus' develops the matter somewhat further, and

says that, according to Cicero, that is to be reckoned as the law of custom which the will of all has

approved without any formal promulgation; and that while St Augustine rightly says that truth is greater than custom, yet when truth and custom agree nothing has greater authority.¹ Irnerius, in a gloss, speaks of the threefold nature of *jus*—that which is established by law (*lex*), by custom, and by the necessity of nature.² And in another gloss, while asserting that nowadays when the people have transferred their authority to the emperor their disuse does not abrogate law, he still maintains that in former times, when the people had the power of making laws, these were abrogated by the tacit consent of all? In his ¹ *Summa Codicis* he deals with the matter very fully, and brings out very clearly the important point that it is not only the custom of the Roman people, but that of any city which has the Force of law—subject, of course, to the written law of the Empire ; and he urges that as the principles of the written law are to be drawn out to meet similar cases which may not be directly provided for, the same is to be done with the unwritten law of custom. Only in regard to unwritten as well as the written laws we must consider the principles of justice and equity on which alone they can be founded. Custom is the best interpreter of laws, for by custom also laws themselves are abrogated?

Another exposition of the matter is given by Azo in a passage in his work on the Code, from which we have already quoted some words. He begins by inquiring what is *consuetudo*, and answers by saying that it is *jus non scriptum*, a body of unwritten, law made by the long custom of the people. How then, he inquires, are we to recognise it! and he gives these tests—the first, that it is received without contradiction ; the second, that no complaint about it will be received in the law courts ; the third, that the law courts have, after discussion and consideration, decided that this is the custom. Finally, he asks, what is the authority of custom ? and answers that by custom laws are established, abrogated, and interpreted.¹

It is clear, then, that these civilians all recognised that custom once had the force of law, but the passages which we have quoted will have indicated that there was among them a difference of opinion on the question, whether custom still and always had this force. We shall best consider this question by proceeding to examine the theories of the civilians with respect to the source of political authority.¹

CHAPTER VII

THE SOURCE OF POLITICAL AUTHORITY.

IN order to consider the theory of the civilians as to the source of the authority of law, and the place of custom in making law, we are compelled to extend the scope of our inquiry, and to ask what they thought as to the source or original fountain of political authority. We have to ask, first, with whom it was that originally there lay the power of making laws,—who were the original sources of political authority ; and next, who was the actual lawgiver, the actual holder of political authority.

The great jurists of the Digest recognised one, and only one, source of political authority in the empire, that is, the Roman people, and the emperors themselves, as late as Justinian, acknowledged this as the true theory.¹ We want now to inquire what was the position taken up by the mediaeval civilians down to the middle of the thirteenth century with respect to this theory, and the conclusions which they derive from it with regard to the nature of political authority. These jurists restate the theory of the *corpus*

juris, but they do not merely restate it, they also discuss with some care the bearing of the theory on the political conditions of their own time.

We may find a convenient starting-point for our discussion by noticing a definition of the *universitas* and its functions which we find in the little treatise, '*De Equitate*,' which Prof. Fitting has edited, and has ascribed to Irnerius. It is the function of the *universitas*, that is, of the *populus* says the author of this treatise, to care for the individual men who compose it, as for those who are its members, and hence it comes that it makes law, and interprets and expounds the law when made, since it is by the law that men are taught what they should do and what they should not do? We may compare with this a gloss of Irnerius on Papinian's definition of *lex*, in which Irnerius treats the *universitas* as being identical with the *res publica*, and says that the *populus* commands in virtue of the authority of the *res publica*, and undertakes obligations in the name of its individual members.² We may again compare with this an interesting phrase in that treatise on the fiftieth book of the Digest which Savigny identified as the work of Bulgarus. The author is commenting on a saying of Paulus, in which it is laid down that individuals are not allowed to perform those actions which belong to the public duty of the magistrate, lest this should prove the cause of disorder, and he explains this by saying that judicial authority has been established lest individuals should make laws for themselves; this power is reserved to the *universitas*, that is, the *populus*, or to him who represents (*obtinet vnum*) the *universitates*, as the magistrate does.³ It is interesting to observe that we have here not only a statement of the supreme authority of the *populus*, but also of the doctrine that all magisterial authority is representative. These passages present a clear exposition

of the principle that the legislative authority of society is founded upon the natural relation between a society and its members? and that if this authority is intrusted to any particular person it is in virtue of some representative character in him.

These general conceptions find a concrete exemplification in the position of the Roman people? and of the Roman emperor upon whom the Roman people have conferred their authority. In the '*Summa Iudicis*?' which Professor Eitting has edited and attributed to Irnerius? we find a phrase analogous in its general conception to that which we have just quoted from the '*De Equitate*?' with regard to the relation of the *universitas* or *populus* to its members? but the phrase also transfers this principle to the case of the Roman State. The authority to make laws belongs? the author says? to the Roman people? and to the prince to whom the people have given this authority? for it is the duty of the people or the prince to care for the individuals, as those who are members and children of the State.¹ The Roman emperor exercises the legislative authority in virtue of the fact that the Roman people has given him authority; his action is that of a representative? or? as Blacentinus? in a passage setting out the source of legislative authority, calls him, a vicar.²

We need not multiply citations to prove that the mediaeval civilians? with whom we are dealing? have all accepted from the *corpus juris* the principle that the authority of the Roman emperor is derived from the grant of the Roman people. They not only repeat the phrases of the Digest or Code, but it is clear that they accept these as the foundation of their theory of political authority.

It is interesting to observe that Azo at least has explicitly applied this theory of the derivation of all authority from the people to the case of the Senate, while the jurists of the Digest can only be said to imply such a view. Both Gaius and Pomponius certainly seem to suggest that the legislative authority of the Senate rested upon the tacit if not expressed authority and consent of the whole people, but they do not directly say this.¹ Azo uses some authority which drew out the derivation of the authority of the Senate from the people in explicit terms, and relates how, when the people became very numerous, it was difficult to summon them for the purpose of making laws, and so the people elected one hundred senators, that they might take counsel on behalf of the people (vice populi), and ordered that whatever they should decree should have the force of law?

We must now go a step further, and consider the theory of these jurists as to certain questions that arise out of these principles. The ancient lawyers, while stating that the people had conferred all their authority upon the emperor, do not expressly say whether, in doing this, they had renounced altogether their own authority, or whether they could possibly still exercise this either by direct legislation or by the force' of custom. It is true that Justinian at least in one passage of the Code speaks of the emperor as being actually the sole legislator,² and that Constantine in the Code says that custom cannot prevail against law,⁴ but how far these phrases represent the general judgment of the ancient jurists is uncertain.

This is just the point on which our medieval civilians differed or were doubtful: there were those who maintained that the people had in such a sense transferred their authority to the emperor, that they could not resume it, and that even the custom of the people had lost its authority in making and unmaking law, while others were inclined to hold that the people retained something of their old power, or at least the right of resuming it. On the one side we find, along with others whose names we cannot recover, Imerius, in a gloss, Placentinus, and Roger, and on the other side Bulgarus, Joannes Bassianus, Azo, and Hugolinus, and their view again seems to have been supported by others whose names are unknown.

In one of the glosses of Irnerius on the Digest, which Savigny published, we have a comment on the saying of Julianas that custom has the force of law, makes and unmakes law (Dig., L 3. 32). Imerius urges that this was once true, but that the statement belonged to the time when the people had the power of making laws, but nowadays, when this power has been transferred to the emperor, the custom of the people can no longer abrogate law.¹ Placentinus is even more emphatic in his assertion of the view that the people have wholly parted with their authority. He describes "our law" as written and unwritten, but the latter, he says, cannot abrogate the former, for the people have transferred their authority to the prince and have reserved none to themselves, and he explains away the phrase of Julianas by saying that this only means that unwritten laws are abrogated by other unwritten laws—that is, one custom by another.² The judgment of Roger, in his commentary on the Code, is equally clear. He says indeed plainly that the legislative authority of the people preceded that of the emperor, and that it was from them that the emperor had received his authority; but this only brings out more clearly the fact that he maintains that⁴ now "only the emperor and the man to whom the emperor has granted authority can make laws."¹

We might have supposed from the confident tone of these statements that this was the only view generally current among the civilians in the twelfth and thirteenth centuries.

When, however, we examine the literature more carefully we discover that some of them hold another tradition. The collection of ⁴⁴ *Dissensiones* ” of the great lawyers contained in the ⁴ *Codex Chisianus* ’ includes a very elaborate discussion of the relations of Custom and Law, and of the effect upon the authority of Custom of the terms under which the people created the emperor. Some writers are mentioned as maintaining that no custom can override the written law, and this for the special reason that the prince is now the sole legislator, while some are mentioned as maintaining that only a universal custom which is approved by the prince can override written law. But on the other hand there are cited the views of some who maintained that either generally, or in certain cases, custom still prevailed against law. Some are cited as maintaining that customs which are contrary to law are to be observed when they are of such a nature that they could be confirmed by an agreement or contract, for custom is nothing but a tacit contract, but not otherwise. Others again are said to hold that a written law which has been ratified by custom cannot be abrogated by custom, but if the written law has not been ratified, then custom can in some cases render the law void. Others again held that a good custom can abrogate law, but not a bad one. More important, however, is the opinion of those who maintained that, while the custom of the people, which has grown up through their ignorance of the law, cannot override the law, that custom which the people have deliberately adopted in contradiction to the law does amend it; and again, the view that while a merely local custom cannot override the law, the universal custom of the people of the whole empire does this.¹ It is clear that the civilians who are referred to, unfortunately only occasionally by name, were greatly divided; that while there were some who held that the Roman people had completely transferred their authority to the emperor, there were others who maintained that the Roman people had always reserved to themselves the authority which they had exercised through their custom.

In the works of Azo, and specially of Hugolinus, we find these positions drawn out more completely, and the conclusions which might be founded on them more explicitly stated. Azo discusses the question of the force of custom in commenting on that rescript of Constantine which we have just cited. What, he asks, is the authority of custom? It makes, it abrogates, and it interprets law, and he cites *Dig.*, i. 3. 32, 33 and *Inst.*, i. 2. 9. There are however, he adds, certain persons who maintain that the true principle nowadays is represented by the phrase in Constantine’s rescript, and that all power has now been transferred by the people to the prince; or again such persons maintain that the principle of *Dig.*, i. 3. 32, only applied to the case of customary laws, which could be overridden by custom, or to the authority of a general custom which had the sanction of the prince. We must, he adds, be careful to consider whether a law which is opposed to a custom, followed or preceded it; in the former case, the law will override the custom, in the latter the custom will override the law.¹ The discussion is very much on the same lines as that of the ⁴ *Codex Chisianus*/ but it is fairly clear that Azo himself looks upon the custom of the Roman people as still possessing the force of law. His meaning in this passage finds its best comment in another passage of his work on the Code, in which he discusses the nature of law, and the persons by whom law can be made. He mentions first the emperor, who is to make law with the advice of the *proceres sacri palatii* and of the Senate; then the Praetorian

Prefect, and those persons to whom the emperor gives this authority; finally, he adds, perhaps even to-day the Roman people can make law, for though its authority has been transferred or conceded to the emperor, this does not mean that the people has wholly abdicated it: once before, the people transferred their authority, but afterwards they resumed it?

This is a passage of much importance : it goes indeed much further than the theories about the enduring importance of the custom of the Roman people which we have so far considered; it carries much further the conception that all political authority ultimately rests with the people. It is certainly of great importance to find an eminent civilian like Azo maintaining that the Roman people had not irrevocably surrendered its authority, and might perhaps resume it again, as it had done before.

Azo's position would be interesting, even if he stood alone, but his conception of political authority has a much greater interest when we observe that Hugolinus, a pupil, along with Azo, of Joannes Bassianus, holds the same principles, but expresses them with more confidence and emphasis. In Ms ⁴ *Distinctiones* ' he discusses the relation of law and custom in terms which are in large measure similar to those of the passage we have quoted from the ⁴ *Codex Chisianus* ' ; but he also expresses with great clearness his own judgment on certain questions arising out of this. Placentinus, he says, had maintained that custom could not abrogate written law, and had interpreted the passage from Julianas in Dig., i. 3. 32, as referring only to those ancient days when the people had full power to make laws, and held that after they had transferred their authority to the emperor, they had ceased to possess this. Hugolinus himself bluntly and emphatically contradicts this, and maintains that the Roman people never transferred their authority to the emperor in such a sense that they ceased to possess it, - while the position of the emperor, he maintains, is that of a procurator ad hoc. He adds the very important information that Bulgarus and Joannes Bassianus had - taught that a universal custom abrogates law, and that even the local custom of a particular city does so within that city, if the custom has been adopted knowingly or deliberately.¹

We have, then, in Azo and Hugolinus, drawn out in explicit phrases the principle which underlies the theory of the enduring force of custom in making law,—the principle, that is, that the Roman people continued, at least in some sense, to be what they had always been, the source of all legislative authority, of all political power. It is, indeed, impossible, on the evidence before us, to determine whether this judgment was more or less widely held than that which maintained that the Roman people had completely transferred their authority to the emperor, and that even their customs had ceased to have authority. We have cited passages which show that this was maintained by Irnerius, Placentinus, and Roger; but against these must be set the names of Bulgarus and Joannes Bassianus for the continuing legislative authority of custom, and of Azo and Hugolinus as holding that the Roman people had never parted with their authority in such a sense that they could not resume it.

It would seem, then, to be clear that as late as the middle of the thirteenth century the civil or Roman lawyers were unanimous in holding that the *populus* was the ultimate source of all political authority, that they recognised no other original source of political authority than the will of the whole community. In the first volume of the work we have endeavoured to show that this was the principle of the ancient Roman jurisprudence; the mediaeval civilians not only inherited these phrases, but understood and even devel

oped the principles of the ancient law, for, as we have seen, they not only held that the *miremta*[^] or *populitx* is the source of law, but some of them at least recognise that this is the natural result of the relation between a society and its members. We have just seen that some of these civilians also maintained that the Roman people still continued to be the actual source of all political authority, that their custom still both made and unmade law, and that as they had once delegated their authority to the emperor, so they might, if occasion arose, resume that authority.

There remain some interesting and important questions as to the theory of the civilians with respect to the mode in which the emperor was to exercise the authority intrusted to him by the people, and as to the extent of this authority. And first, we inquire into their theory as to the method of legislation by the emperor. Here again we find a sharp division of opinion, some maintaining that the simple letter or rescript of the emperor has the force of law, others that the emperor had to go through certain forms, and to obtain the assent of certain persons before he could promulgate a new law. This division of opinion arises directly out of a difference as to the interpretation and the permanent authority of certain passages in the Code.

The *° Libellus de Verbis Legalibus* ' defines a " Pragmatic Sanction " as a new constitution devised by the Senate, and bearing upon some new and difficult question submitted by the emperor.¹ This definition only refers to one particular form of imperial legislation; but it is suggestive to find that, in the view of the mediaeval civilians, the Pragmatic Sanction required the advice or authority of the Senate. When we turn to Irnerius we find him laying down a general principle of great scope and importance. In a passage, of which we have already quoted a part,¹ he discusses the question by whom and by what process laws are to be made, and says that laws are made by the Roman people, or by that person to whom the Roman people have given their authority; while the manner in which laws are to be made is defined by the constitution of Theodosius and Valentinian—that is, they are to be first considered by the chief men of the court, and especially by the Senate, and after that they are to be promulgated. This, Irnerius adds, is the true method of legislation, for law is an ordinance of the people, promulgated with the advice of the wise men of the community?

It is very important to notice that this principle is maintained by Irnerius, and that several civilians follow him. Boger is very clear and emphatic in asserting this view, and says that, in making laws, the emperor is to follow the forms prescribed by the constitution of Theodosius and Valentinian? Azo has discussed the matter very fully, and is equally clear. He first defines the nature of the constitution of this prince, distinguishing between this and the edictum, and then asks by whom these imperial laws are to be made. He answers that they are to be made by the emperor, with the council of the notables of the sacred " palatium " and in the assembly of the senators. 2V law is to be considered twice, and finally, if all agree, it is to be read in the " palatium " or consistory, that it may be confirmed and promulgated by the prince?

We must, however, notice that the view of Bulgarus is quite different. In a gloss on Cod., i 14. 3, he says that there were some who wished to conclude from this constitution that, the Lombard law was no law at all, inasmuch as it was not issued with this procedure: Bulgarus himself emphatically repudiates this conclusion, and maintains that Theodosius could not impose a law on the emperors who succeeded him, but could only

give them his advice; the formalities, therefore, prescribed by the constitution of Theodosius and Valentinian need not be observed.¹

Clearly there was a division of opinion among the civilians, but it is extremely interesting and important to observe that some of the most important among them should have so dogmatically held the view that the legislative authority of the emperor could only be exercised with the counsel and consent of the Senate. It would seem probable that the civilians may have been influenced by the general constitutional principle of the new Teutonic States, but it is also interesting to observe the continued or revived influence in the West of these clauses of the fourteenth title of the first book of the Code. There does not appear, as far as we can find, to be any very careful discussion of the significance and importance of these rescripts of Theodosius and Valentinian. It would seem as though they were intended in some measure to revive the legislative functions of the Senate. It seems to be clear that Justinian did not regard them as in any way binding upon him,¹ and it would seem that the attempt to revive the functions of the Senate had little immediate effect; but it is possible that these rescripts may have exercised a greater influence in the West than we are at present aware of. It is worth while to observe that the "Dis-sensi.on.es Dominorum," contained in the ⁴ Codex Chisianus,⁵ indicate that certain civilians maintained that the Senate still possessed the power of making and abrogating law?

Some of the civilians then maintained dogmatically that the emperor or prince had no arbitrary authority in legislation ; it is important to observe that some at least of the civilians maintained that his authority was always in some measure limited by the law. Azo discusses the question how far the emperor could issue rescripts or *prmlgia* contrary to the law, and says that such privilegia are invalid if they do serious injury to any one, unless the emperor inserted a *non obstante* clause: he adds that it must not be assumed that the prince intended to act against the law, unless he definitely said so, inasmuch as at the beginning of his reign he swore to observe the laws.³ We may perhaps here again trace the influence of contemporary and traditional Teutonic custom on the civilians.

There is an interesting discussion of the question of the limitation of the emperor's authority in the ⁴ *Question.es Juridical* ' of Pillius, a civilian of the latter part of the twelfth century. The particular point discussed is the question whether a sentence given by the emperor in an appeal case would be valid if both parties to the case had not been summoned to

appear. Pilling first gives the reasons for holding that such a judgment would be valid, and enumerates some of the most noteworthy examples of the authority of the prince : he can emancipate a slave, he can make the freedman
he can legitimatise a bastard, he can ennoble a man of humble station, he can make a rich man poor; the emperor can make law, can amend it, can abolish it, can interpret it; if he can do all these things, who can really doubt that he can give judgment without summoning both parties to a case. Further, every secular power is inferior to him,—who then can discuss his judgment ? certainly not his inferiors; and, even if you could find an equal to the emperor, he could not annul his sentence, or even take cognisance of it. On the other hand, it is contended, Pillius says, that the judgment of the prince under such circumstances is invalid, for there are many things that he cannot do ; for instance, he cannot annul a sale, or a testament, or a donation, he cannot confer a monopoly, he cannot enact anything contrary to *jus* and *to*. If he cannot do any of these things, much

less can he act in a manner so contrary to legal order as to give judgment without hearing both sides. Pillius concludes by giving his own opinion, which is very cautious; he holds that no judge can set aside the sentence of the prince, but that the prince himself should correct it.¹ Pillius has carefully balanced the arguments for and against the limitation of the imperial authority; for us it is important to recognise that the Question of the limitation of the imperial authority was discussed in the law schools.

There remains one aspect of the theory of the imperial authority in these civilians which we must consider—that is, the theory of the relation of the emperor to private property. Savigny has put together the traditions as to the differences among the Bologna doctors when consulted by Frederick Barbarossa, about the imperial rights over private property, some of them maintaining that the emperor was really the lord of all property, while others denied this.¹ It is clear that there was much difference of opinion among the civilians of the twelfth and thirteenth centuries with regard to the subject. The earliest discussion of the matter which we have found in this period is contained in Irnerius' *Summa Codicis*; according to the text which Professor Fitting considers to be the original, he holds a clear and decided opinion upon the subject, and maintains that any person who accepts from the prince property, which belongs to another man may be compelled to make restitution: no rescripts, he adds, procured by fraud, or contrary to the law, or injurious to others are to be received; they are in error who maintain that the prince can seize a man's goods and give them to another, without due cause—such a proceeding is condemned by the law of the courts and of heaven?

It is a curious thing to find that a Bologna MS. of this same work has a wholly different text in this passage, and seems to represent a defence of the view that the emperor can take a man's property and give it to another? Professor Fitting has suggested that this text represents a modification of his original view by Irnerius himself, in consequence of his being in the imperial service? However this may be, these texts will serve as illustrations of the diversity of opinion among the civilians upon this subject. We find the matter further illustrated in the collection of the *Dis-sensiones* of the early jurists. In the collection made by Hugolinus, some jurist is reported to have said that the emperor could transfer one man's property to another.¹ In the similar collection made by Boger, he states that some maintained that the prince could alienate a man's property whether he knew that it was the man's and not his own, or was ignorant of this, and that this was founded on Cod., vii. 37. 3, but adds that Jacobus, one of the four doctors, the immediate successors of Irnerius in Bologna, maintained that this law was only applicable to cases where the emperor was ignorant that the property was another man's.² Another collection cites Martinus, also one of the four doctors, as agreeing with Jacobus? Azo discusses the question in his *Brocardica* and agrees with Martinus and Jacobus, but also holds that the emperor can make grants of that property which is in part his, and even of that in which he has no share, if this is for the benefit of the State and the public utility demands it?

If we attempt to sum up our impression of the theory of political authority which was held by these civilians, we are led to the conclusion that the conception of the revived study of the Roman law as unfavourable to the progress of political liberty, while it may contain some elements of truth, requires at least very considerable qualification—at least, so far as its influence in the twelfth and early thirteenth centuries is concerned. We

have seen that these civilians are unanimous in recognising that the people is the only ultimate source of political authority and of law. This was not indeed a conception strange to the Middle Ages, for the normal conception of the new Teutonic States was that law and political authority proceeded from the nation as a whole; but while the conception was not strange, it was probably a thing of much importance that the representatives of the legal traditions of the ancient civilisation should have held the same principle as those who represented the new order. It is quite true that a section of the civilians held that the people had wholly parted with their original authority, and that some of them attributed to the emperor the possession of an almost unlimited authority; and so far it is true to say that the influence of the revised Roman law was unfavourable to the progress of political freedom. But against this must be set the fact that some of the most important of these jurists held very different principles—that some of them maintained that the legislative authority of the people had never been transferred to the emperor in such a sense that they had wholly and for ever parted with it, but that rather the people might at any time resume the authority which they had bestowed; while some of them also maintained that the emperor possessed no unrestricted authority—that his legislative functions could only be exercised with the advice of the Senate, and that he possessed no unlimited power over the property of his subjects.

CHAPTER VIII

THE THEORY OF THE RELATIONS OF THE ECCLESIASTICAL AND SECULAR POWERS.

THIS subject presents considerable difficulties; for though these civilians furnish us with a considerable amount of material for the discussion of details, they do not discuss the general theory of the relations of the two powers. This arises from the fact that they do not often travel outside the scope of the law books of Justinian; and these, while also furnishing much information on details, do not contain any clear statement of the theory either of the spheres or of the relations of the two powers. ...

The lawyers, as we have endeavoured to show, are clear as to the nature of the authority of the civil law—that is, that it represents those principles of justice which ultimately have their fountain and source in God Himself; while the immediate and direct source of authority in political society is the people, or the person or persons upon whom the people have conferred their authority. The system of the secular order is, then, in their minds sacred, fulfilling as well as may be, under the terms of the actual conditions of the world, the purpose of the final justice of God Himself. We may find a formal expression of this conception in certain phrases of these writers. John Bassianus, the master of Azo and Hugolinus, in commenting on the ‘*Novels*,’ says that God established the emperor upon earth in order that by him, as by a procurator, he might make laws suited to circumstances as they arise, and that the emperor might thus benefit his subjects.¹ Again, Hugolinus, after beginning his work on the Digest with the invocation of the Holy Trinity, says that the fear of God is the foundation of law, which is in its turn the foundation of human society and the State—for the State is a multitude of men joined together to live by law.²

The civilians, then, clearly held the principle of the sacred nature of the secular law; but they also very clearly recognise the existence alongside of the civil law of another law which is not to be confounded with the civil law. We may find an expression of this conception in a phrase of the ‘*Summa Codicis*’ of Roger, in which it is said that there are

two systems of jus—one human and one Divine; and of these the Divine is the more exalted.³ And again, alongside of the organisation of civil authority there is another organisation, which derives its authority from God as well as from men,—an organisation which, as it ■ has its own laws, has also its own courts and jurisdiction. This conception is expressed in a phrase of that work on the Code which Professor Fitting attributes to Imerius. The author speaks of the court or authority of the Bishop as being given to him by divine as well as by human law.¹ We may add to this a phrase of Pillius, in which he speaks of the Pope as having, in divine matters, that same complete (plena) jurisdiction which the emperor has in his.² The civilians may make little direct reference to the theory of the relations of the Church to the State, but there can be little doubt that they look upon it as related to it, but also distinct, and as possessing a character and authority which are divine.

We must begin by examining the conception of the canon law which is held by the civilians, or rather their view of its relation to secular authority and law. The civilians recognise very clearly the supremacy of the law of God over the civil law. The prince, according to Placentinus, is not to ordain laws contrary to the Lord or to nature;³ according to a passage in the collection of Dissensiones of Hugolinus, rescripts which are contrary to the natural or divine law are to be rejected by the courts.¹ Azo says very emphatically that an imperial rescript or privilegium, against the law of God, of the apostles and evangelists or prophets, is to be wholly rejected ; the emperor cannot abrogate the laws of his superior, though he may apply them with some discrimination of persons, and of the public needs? This is an important qualification; and in another passage he applies it specifically to the question of usury, which may be permitted by the civil law on account of the actual necessities of the world, though it is properly unlawful because it is against the law of God? It is, however, clear that the civilians fully recognised that the law of God in the Scriptures represented an authority superior to that of the civil law, and that whatever was contrary to this was properly invalid.

But we must now ask what was their attitude to the canon law of the Church, as distinguished from Scripture. There is one set of canons which all the civilians seem to recognise as having the force of law. These are the canons of the first four general councils. We find this stated first in the

* Exceptions ' of Peter, then in Joannes Bassianus, and finally in Azo, and we may assume that the principle was universally accepted by the civilians. This is, indeed, what we should expect, for the principle is laid down by Justinian himself in the ⁴ Novels,' from which, or from the ^c Epitome Novellarum ' of Julian, the civilians derive it? It must be noticed, however, that these canons have the force of civil laws, because Justinian has given them this; there is not in any of these passages any suggestion that they have this force in virtue of their own authority,—that is, that their relation to the civil law is the same as that of the law of God in nature or of the Scriptures. We have not found that any civilian commenting on the civil law suggests that the canon law as such has the force of civil law, or is superior to civil law within the sphere of the latter. As far as we can understand these writers, their conception of the canon law seems to be that of a system parallel to the civil law, supreme, no doubt, in its own sphere, but not possessing authority outside of this.

When we now consider the theories of the civilians on the immunities of the clergy, we come to the conception of the two societies, with their respective authorities and jurisdictions ; and here it is important at once to observe that the civilians are clear that this authority and jurisdiction are founded not only on human law, but on the divine. We have already quoted the passages of Irnerius and Pillius in which these conceptions are expressed? It must be observed that Irnerius is clear that the episcopal jurisdiction in its plenitude extends only over those persons who, in his phrase, *dmnam mititia/m, gerunt*; all secular legal proceedings, whether among these persons or against them, must be brought before the bishop, but in the case of other persons the bishop can only take action if they desire it? We shall have to consider this matter presently in detail; for the moment we must fix our attention upon the fact that Irnerius clearly recognises two classes of persons—the one consisting of those over whom the bishop has full jurisdiction, and clearly he means by these those who have the ecclesiastical character; the other class, by which he means the laity, over whom, in secular matters, the bishop has no regular jurisdiction, except at their own desire. We have here very clearly the conception of two societies, two jurisdictions—not, indeed, that such a passage presents us with a complete view of the subject, for the laity, as members of the Church, belong to the ecclesiastical as well as the secular society, but we have at least, very clearly marked, the conception of the two jurisdictions, and the principle that the ecclesiastical jurisdiction exists by divine law, while it is supported by human law.

The clergy are, properly speaking, that is, as clergy, subject only to the jurisdiction of the Church. We may put this as summarily expressing the conception of the civilians. We must consider this in detail.

The first and simplest case is that of the prosecution of an ecclesiastic for a spiritual or canonical offence. It is hardly necessary to cite authorities to illustrate the general principle that such cases belong to the bishop; we may refer to passages from Irnerius and John Bassianus.¹ The next case is that of civil proceedings by one ecclesiastic against another; such cases belong normally, according to Irnerius and Roger, to the bishop? We come to a more difficult matter with the question of a civil suit brought by a layman against an ecclesiastic. Broadly, the civilians are clear that such cases must go to the bishop's court, and this principle is derived by them from the ¹ Novels ' of Justinian, either directly or through the ⁴ Epitome ' of Julian. But while this principle is thus broadly held, they also derive from the ^k Novels ' and the * Epitome ' the principle that if the bishop will not or cannot decide the case, then the plaintiff may go to the secular courts. These principles are set out tersely but clearly in ⁴ Petri Exceptiones⁹ and in the ⁴ Brachylogus.³ The same view is expressed by Irnerius,⁴ and, with an important addition, by Boger and Accursius, who mention some civil cases which the bishop cannot decide, and also explain a process 'under which the case is to be re-tried by the secular

court if the bishop's sentence is held to be unjust.¹ John Bassianus states the general principles in much the same way, and mentions some other circumstances which may prevent bishops from acting; but he does not refer to the process by which the case is to be taken to the secular court in the case of an unjust sentence in the spiritual court? Azo puts the matter briefly, very much as John Bassianus does; he also makes no reference to the possibility of recourse to a civil court against an unjust judgment of the

bishop.¹ A somewhat later civilian, Bagarottus, puts the principle briefly, that no civil case by an ecclesiastic or by a layman against an ecclesiastic is to be heard in the civil court.² It is noticeable that Roger is the only one of the civilians who, as far as we have seen, maintains that if the lay suitor thinks the Bishop's sentence is unjust he can go to the secular court.

We turn to the question of criminal proceedings against the clergy. The author of the *Brachylogus* says that in criminal cases the cleric may be brought either before the bishop or before the secular court: if the case is taken to the bishop, and he finds the accused *dignus capitali supplicio*, he is to degrade him, and hand him over to the *prases* to be punished; if the case, is taken in the first instance to the secular judge, he cannot punish the cleric until he has been degraded by his bishop; if the bishop is doubtful about the justice of the treatment of the case, he can postpone the degradation (*sub legitima cautela*) until the matter has been referred to the prince.³ This is very close to the *Epitome* of Julian and the *Novels*.⁴ Irnerius says that criminal cases against a cleric are to go to the civil judge, who must decide the case in three months: if he find the accused guilty, he must not condemn him until he has been deprived of the priesthood (*sacerdotio*) by the

bishop.¹ Boger lays down practically the same rule as Irnerius? John Biwianus holds that in criminal matters the case is to go to the secular court, unless the accuser prefer to take it first to the bishop's court: if the secular court finds the accused guilty, the sentence is not to be pronounced until the record of the proceedings has been sent to the bishop: who is to degrade if he is satisfied with the evidence, then the secular court is to impose the proper punishment.³ The view of Azo is that criminal cases against the clergy belong to the civil judge, who can. acquit without consulting the bishop; but if he exclude that the accused is to be condemned, he must first be deprived of his orders by the bishop.⁴

These civilians all agree in the main principles, that it is for the secular court to try and punish the cleric? but that the court cannot carry this out until the bishop has degraded the cleric. Some of them—i.e., the author of the *Brachylogus* and John Bassianus—also clearly held that the bishop is to consider whether the evidence is satisfactory before he degrades: it is not clear whether Irnerius, Boger, and Azo take this view or not. The author of the *Brachylogus* stands alone in following Nov., 123. 21, in the view that if the bishop is not satisfied the matter is to be referred to the prince. The clergy are, then, primarily subject to the jurisdiction of the Church: it is not till they have been deprived by the Church itself of their ecclesiastical character that they come under the ordinary jurisdiction of the secular authority.

The theory of Church and State so far might seem to be comparatively simple; we might almost think that they were regarded by the civilians as two parallel societies, each with its own members and its own organisation, separate in such a degree that normally the members of the one are not subject to the jurisdiction of the other. The truth is, however, that no such simple and easy definition was possible, and this becomes very clear when we consider the principles of the civilians with regard to the relation of the laity to Church law and Church courts.

For the laity, as members of the Church, are in some respects subject to Church law, and are in some measure under the jurisdiction of Church courts. A layman may be guilty of an ecclesiastical offence, and is then liable to be brought before the Church courts. The layman, however, is not liable to the jurisdiction of those courts in the same way as the

ecclesiastic. John Bassianus and Azo maintain that when a layman is charged with an ecclesiastical crime he is to be tried, not by the bishop alone, but by the bishop and the praises. They found this judgment upon certain phrases of Justinian in the Novels; whether their application of these was correct we do not pretend to say.¹ The layman is then subject to the Church law and to the jurisdiction of the Church, though, as these civilians hold, the secular authority is entitled to take its part in the decision of cases brought against the laity in the Church courts.

And again, in quite another connection, we find illustrations of the fact that the two societies are not really separate. For the civilians very clearly recognise that in certain cases the ecclesiastical authorities could intervene even in purely secular matters. The first example of this which we have to consider is the permission given by the Roman law to take a civil case between two laymen before the bishop, instead of the secular judge, if both parties to the suit agreed. This is implied in the ⁴ *Exceptiones* and the ⁴ *Brachylogos* and is laid down by Irnerius in his treatise on the Code and by the Provencal *Summa* of the Code. Irnerius makes it clear that such a procedure is entirely voluntary, but he adds that if the parties have agreed to it, and have appeared before the bishop, they will then be compelled to go on: against the judgment of the bishop in such cases there is no appeal, and it must be carried out by the civil authorities.¹ More important, however, is the doctrine of the civilians that, at least in some cases, if a suitor has doubts about the justice of the secular court he may demand that the bishop should sit in court with the secular judge. This doctrine is set out in the handbooks of law, and also by Joannes Bassianus and Azo, among the great civilians of Bologna. In the ⁴ *Exceptiones* the principle is laid down that while no one can refuse the jurisdiction of the *judex ordinarius*, if either the plaintiff or the defendant suspects the judge, he may demand that the bishop, or some other honest man (*probus*), should sit with the judge, and if they then agree in their judgment, the man who has called in the bishop, or other judge, may not appeal. The same principle is briefly stated in the ⁴ *Brachylogus*.⁹¹ These regulations are evidently derived from the ⁴ Novels ⁵ of Justinian and from the ⁴ *Epitome*:⁹² but it must be observed that the rule that a man who thus calls in the bishop may not appeal is not clearly asserted in the ⁴ Novels.⁹³ It lays down the principle that if a man cannot get justice from the judge, he is to call in the bishop; and if the bishop cannot persuade the judge to do justice, he is to give the suitor letters to the emperor?

Joannes Bassianus intended evidently to summarise the provisions of the same 'Novel,' and suggests a regular process—first to the judge, then to the bishop, and finally to the prince.¹ This does not seem a very accurate mode of dealing with the texts, but it is to us important as exhibiting the way in which he understood it. Azo, in his work on the Code, does not discuss the matter in detail, but writes as though it were a clearly admitted principle that while it is only minors, widows, and poor persons who have the right to refuse the jurisdiction of the *judex ordinarius* and (« be heard directly by the prince, yet any person has the right, if he holds the judge in suspicion, to demand that the archbishop should sit with him.²

We have here a very important point in the relation of the ecclesiastical and secular authorities. We cannot discuss now the motives which led to Justinian, and perhaps earlier emperors, to establish this system: that they had any special intention of increasing the authority of the Church, as such, would not seem to be the case. These arrangements are, indeed, only a part of what would seem to have been

an elaborate system for checking the representatives of the Imperial Government by means of the bishop and other persons of importance in the various localities.¹ The survival, however, of these principles in the Middle Ages, when the question of the relations between the ecclesiastical and the secular authorities had become so important, has quite another significance. We shall come back to the matter when we deal with the canonists ; but in the meanwhile we find here an example of the fact that the recognition of the different spheres of the two authorities does not mean that these authorities, even in the judgment of strict lawyers, did not run across each other.

On the great question of the appointment of bishops these civilians say little ; but that little has some significance. Joannes Bassianus discusses the question in commenting on ^c Novel ' 123, which prescribes that when there was a vacancy in any see, the ecclesiastics and principal persons of the place were to elect three persons, of whom one was to be made the bishop. John Bassianus alters this, so that apparently he means that the clergy and principal persons of the diocese are to choose three persons, who are then to elect the bishop.³ Azo comments on the regulation of the Code—that when there is a vacancy, the

in habitants of ■ the diocese are to ■ elect three. persons of: proper. .' character, of whom one is to be made the bishop. Azo alters this, so that the principal ecclesiastics of the diocese are to elect three of 'the clergy, who are in their turn to elect the bishop. But ■he: also'adds that the first body are to choose the electors with the sanction of the emperor.¹ It is interesting and important to observe that Azo excludes the. laity -of the.' diocese ' from ' any 'Share/in.; the'.' election, and he also excludes the inferior clergy; while on .the other hand he' clearly requires that .the emperor ■ ' should have some share in the election.

PART II.

THE POLITICAL THEORY OF THE CANON LAW TO THE MIDDLE OF THE THIRTEENTH CENTURY.

CHAPTER I.

INTRODUCTION.

IN the first volume of this work we have endeavoured to discuss, not only the theory of the relations of Church and State, hut also the general theory of Society and its institutions, in the ecclesiastical writers of the first six centuries of the Christian era, and again in the ninth century. We have sometimes referred to the canons of councils and other sources of the, systematic body of Church law, but the greater part of our information was drawn from works which were not, in their primary intention, legal works at all, from purely religious or theological works, or from the more formal correspondences of great churchmen. In the period which we have now to consider, we have found it necessary to separate the treatment of the theory of society which is presented in the formal treatises upon ecclesiastical law from the examination of the other works of churchmen. It is necessary to distinguish carefully between incidental and sometimes hasty sayings, made under the stress of some great controversy, and judgments expressed in legal and other works which were compiled in cold blood and represent reasoned and considered conclusions.

We do not need to discuss the history of the gradual process of accumulation and selection through which the Canon Law passed before it reached the form which it now wears in the ^k Corpus Juris Canonici,' but a few words are needed to explain the nature of the sources from which it was drawn, and the stages

through which it passed. The canon law is in the main derived from four different sources — the Holy Scriptures, the decrees of the great general councils and of certain local councils, certain letters of the Bishops of Rome on public and judicial matters, and the writings of the Fathers. The relative importance and authority of these sources we shall have to discuss in detail when we come to deal with the theory of the canon law itself.

From these sources there arose various collections of canons, and these were greatly enlarged by the production in the ninth century of the great collection of spurious Papal letters which we know under the name of pseudo-Isidore— a collection which is now generally held to have been made in Prance, and which gradually found its way into the literature of the canon law, both in Italy and in the North, in the course of the tenth and eleventh centuries. In addition to these the mediaeval canon law books also contain many passages taken from the Boman law books, and from the collections of the genuine and spurious capitularies. It was not till the middle of the twelfth century that Gratian, who had possibly been trained in the law school of Bologna, took in hand the task of selecting from and systematising this great but confused mass of materials, and in his ⁴ *Decretum* ' we have the first attempt to present a complete and ordered body of Church law. The work of Gratian was carried on by a number of canonists, who worked upon the materials contained in the ⁴ *Decretum* ' after the fashion of the work of the civilians of Bologna on the ⁴ *Corpus Juris Civilis*? They wrote glosses and commentaries on the ⁴ *Decretum*, ' in which they carried on Gratian's attempt at the systematic exposition of the texts, and the application of these texts to their own time. The formal collection of canon law was carried on by the publication of various small compilations of the decretal letters of the Popes of those times, until at last in 1234

Pope Gregory IX. issued what was intended to be a complete and sufficient collection of these letters. This is that part of the canon law which we. know as the " *Decretals*." To this collection were later added by Pope Boniface VIII. the collection of *Decretals* known as the *Sext*, and by Pope Clement V. that known as the *Clementines*, but with these latter collections we do not deal in this volume?

CHAPTER II.

THE THEORY OF LAW IN GENERAL.

WE begin by inquiring into the general theory of law in the canonists. We must do this before we can form any clear conception of the theory of the canon law and its relation to other systems of law. It is evident to any student that the principles of the canonists as to the nature of law are derived from the Roman law; but—and this is a fact of importance—it is derived from the Roman law very largely through St Isidore of Seville. What exactly are the sources of St Isidore's treatment of law is indeed doubtful: an interesting attempt has been made by Voigt to set out the relations between his work and that of Ulpian and Marcianus,¹ but much remains obscure. St Isidore's exposition of law is sometimes very close to that of the *Digest* and *Institutes* of Justinian, but is also in part independent.

We begin by taking account of a definition of law contained in the work of Ivo of Chartres. In the great collection of canonical materials which is called the ⁴ *Decretum* ' of Ivo, and which was probably compiled by him, an interesting passage from St Isidore's ⁴ *Etymologies* ' is quoted. St Isidore describes the true nature of law as being *honesta*, just, possible, agreeable to nature, conformed to the customs of the country, suitable to its

place and time, necessary, useful, clear, and devised for the common good of all the citizens, not only for that of some individual? This quotation is repeated in the 'Panormia,' the handbook of canon law which is recognised as an undoubtedly genuine work of Ivo. These phrases set out the conception on which the canonical theory of the proper nature of law is built; up. Law must be agreeable to nature, just, devised for the common good, must represent the custom of the country in which it is to be in force. That is, to express this in broader terms, law is not an arbitrary command imposed by a superior, but rather represents the adaptation of the permanent and immutable principles of "nature" and justice to the needs of a community, under the terms of the circumstances and traditions of that community.

When we turn from Ivo to Gratian, we turn from an intelligent and scholarly compiler to a technical jurist. For, as we have already said, it was the work of Gratian to impose upon what had hitherto been the somewhat formless collections of canons the character of an ordered system of law. Hitherto all that had been done had been to collect canons of councils, papal letters, and opinions of the Fathers, bearing upon the discipline and organisation of the Church, and to arrange these roughly under the various subjects to which they belonged. Gratian had possibly been trained in the technical law schools of Bologna, and recognised that if the canon law was to have any scientific character this heterogeneous mass of materials needed to be sifted, co-ordinated, and criticised. He accordingly set out to arrange the materials, to compare them, and to draw such general conclusions from them as were possible. When we come to discuss the theory of the canon law itself, we shall have to discuss more fully his attitude to the materials he found in the collections of canons which, he used. For the moment it is enough to notice the fact that it was Gratian who first reduced the chaotic mass of canonical authorities to a system, and set his hand to the statement of such general principles and rules as could be deduced from them. When

we turn, then, from Ivo's treatment of law to Gratian's, we turn from a writer who is content to put together authorities, to a writer who endeavours to draw from these authorities an adequate and practical criticism of the nature and origin of law.

Gratian's treatment of the nature of law is founded primarily upon St Isidore: whatever his knowledge of the civil law may have been, it is on Isidore's sayings that his discussion of general principles is based. St Isidore in one place sets out a classification of law as human and divine, and says that divine law was established, by nature and human law by custom (*mores*);¹ while in another passage he sets forth the tripartite character of law, as divided into the *jus naturals*, the *jus gentium*, and the *jus civile*² Gratian accepts the tripartite division; but as the basis of his most general discussion of law, and at the outset of his work, states the twofold division, of divine or natural law on the one side, and human law, which is founded on custom, on the other?

This passage contains two principles, which are each of the greatest importance,—the identification of natural law with divine, and of human law with custom. The first principle, that natural law is divine, is one of the most important conceptions of the canon law: we shall have to consider this presently in detail, and only make one observation for the moment. The explicit statement by Gratian is of the greatest importance, although the conception itself is not original. It is asserted in the passage of Isidore quoted by Gratian, and St Isidore is only reproducing what we have endeavoured to show was the normal doctrine of the Christian Fathers,¹ and this again was derived in part

from St Paul, but even more from Cicero and other ancient writers, for Cicero had taught very emphatically that the law of nature is the law of God.² It is not, however, any the less important, that Gratian should have taken these principles as the starting-point for his treatment of the nature of law; we shall see, when we come to deal with the detailed discussion of the natural law, that this law, being itself divine, is superior in dignity and in permanence even to certain positive forms of the law of God, while it is superior to all authorities whether in Church or State* Gratian's principle should be compared with the carefully developed view of the medieval civilians, that justice and equity are superior to all positive laws, and that God is Himself equity?

The second principle is as important as the first. Human laws are regarded by St Isidore, in the passage here quoted, as based upon custom, and the variety of human laws is explained as due to the fact that different nations have different customs. Gratian accepts this principle, and uses the word *mores* to cover the 'whole range of human law, explaining these more fully by defining them as *mores jure conscripti et traditi*. In another passage of the same * Distinction/ he quotes St Isidore's definition of *consuetudo* as being that form of *jus* which is founded upon custom, and which is accepted as *lex* in the absence of *lex*, and St Isidore's observation that custom is equally valid whether it is drawn out in writing or whether it is only established by ° reason," for, after all, it is < "reason " upon which the value of *lex*, the written law, depends. From these phrases Gratian draws the conclusion that all law is really custom, that part which is written down being called *constitutio siue jus*, while that part which is not written is known as *consuetudo*.¹ This is a far-reaching principle which is thus laid down by Gratian; it is no doubt implicit in the ancient Roman law, but it was not expressly drawn out, and it has very important consequences on the theory of the source of the authority of law.

Human law is, then, custom, whether reduced to writing or not. But this does not mean that Gratian thinks that any custom is entitled to be recognised as law. Having laid down the general principle which we have just discussed, he quotes Isidore's saying that *jus* is so called because it is just/ and in the fourth ⁶ Distinction ' he goes on to consider the purpose, and therefore the essential quality, of law; and, citing another passage from Isidore, he defines the purpose of law as being to restrain men's audacity and their opportunities of injuring others; while he describes the nature of law in the terms of the same passage from St Isidore which we have already discussed as cited by Ivo of Chartres. In establishing laws, he says, we must be careful to consider whether they represent the principles of *honestas*, justice, possibility, and those other qualities described by St Isidore?

We shall have to return to this question presently, when we consider in more detail the nature of the particular law of any State, the source of its authority, and the relation of this to custom. In the meanwhile it is enough to observe that when Gratian identifies human law with custom, this does not at all mean that he conceives of custom as having any force, except so far as it corresponds with the principle of justice. But in order to treat this subject adequately, we must turn to that tripartite delimitation of law which the canonists inherit from Isidore and the *corpus juris* doctors.

CHAPTER III

THE THEORY OF NATURAL LAW.

WE have pointed out that St Isidore of Seville restated the tripartite division of law set out by IJlpian and repeated by the Institutes of Justinian. Here therefore is a point where the patristic and the legal tradition of the Middle Ages coincided, and the canonists accept this tripartite division without question.¹

We must however again notice that while Gratian accepts the tripartite definition of law, this threefold division is subordinate to the twofold division of Natural or Divine Law and Custom, for the *jus gentium* and the *jus civile* are both included under *mores*, while natural law is equivalent to divine law? We must consider more closely what the canonists understand by *jus nature*s or *jus natural*s. Gratian cites the definition of Isidore,³ but does not himself furnish us with any technical discussion of this point, though, as we shall presently see, he discusses very important questions arising out of it. We have already quoted the words in which he describes the *jus nature*s as equivalent to that principle of the law and the Gospel which bids us do to others what we would that they should do to O/ and to this we shall have to return. But before doing this we shall find it useful to turn to the 'work of Kuflnus, one of the most important Mveifh-
contry common! at ors on Gratiau. In his comment on the phrases with which Gratian introduces his first ⁴ Distinction,' Rulinus has carefully stated the sense in which he understands the phrase "Natural Law." The *legistica traditio*, he says, has defined the conception of the *jus natural*s when it says that natural law is that law which nature has taught all animals, but the canonists, neglecting so general a conception, are concerned about its meaning in relation to matters which relate to the human race alone. The *jus natural*s is a certain quality implanted in mankind by nature, which leads men to do what is good and to avoid what is evil. This *jus natural*# consists of three parts—of commands, prohibitions, and demonstratives, It commands men to do what is useful, as for example, ⁰ Thou shaft love the Lord thy God "; it forbids that winch is hurtful, as for example, "Thou shaft not kill "; and it points out (demon* strat) what is expedient, as for example, that all tilings should be held in common, that there should be liberty for all mankind? We must presently consider how it comes about that some of the latter provisions of the natural law have been set aside. But it is of great importance first to observe the formal
repudiation by Rufmus of IJlpian's definition, which makes "natural law " a matter of animal instinct. Bufinus returns to this in discussing a later part of the same ⁴ Distinction/ and reminds his readers how he has already warned them that the ancient lawgivers use the phrase *jus natural*s in a different sense from that in which the canonists' use it. They (the old lawgivers) use this phrase in such a general sense that it would seem, to be something common to all animals, white the canonists use it in a restricted sense as applied only to mankind.¹

We should compare with this the discussion of the subject by Stephen' of Tournai, another of the important twelfthcentury commentators on Gratian. He explains that the phrase *jus natural*s can be used in various senses: in that of TJlpian, as the principle or instinct common to men and all animals ; as equivalent to the *jus gentium* ; as equivalent te the divine law which God has taught men in the law and the prophets and the Gospel; in a still wider sense as that law which includes both human and divine law, and that instinct which is given to all animals; and finally, in a fifth sense, as that law which is by nature given to men and not to the other animals—the law which teaches men to do good

and to avoid evil; this is a part of the divine law, and consists of commands, prohibitions, and demonstrationes.² In this last definition of the meaning of the *jus naturale* Stephen agrees with, is indeed probably following, Rufinus. In his analysis of the conception and his recognition that the phrase must have many senses, he suggests a comparison with the civilians. We have pointed out the recognition of the manifold significance of this term *jus natural**. in Azo's commentary on the Institutes;¹ whether Stephen, who had certainly studied the civil law at Bologna, had learned this mode of thinking from the civilians, or whether the civilians, like* Azo, learned it from the canonists, we do not pretend, to say.

Stephen's treatment of the subject is interesting, but we can hardly doubt that it is the definition of Rufinus which corresponds most closely with what is usually meant by the *jus naturals* in the works of the canonists. We have seen that Gratian, in dividing all law into natural and customary, identifies the *jus naturals* with the *jus divinum*. Its characteristic expression is found, he says, in the great phrase of the Gospel, "Do unto others what thou wouldest wish others to do unto thee?"² Natural law, therefore, is superior to all other law—it is primitive and unchangeable,⁸ all customs and laws contrary to the *jus naturals* are void? In another passage Gratian urges the agreement of natural law and the Scriptures, and concludes that natural law is supreme just as the divine will and the Scriptures are supreme. All constitutions, whether ecclesiastical or secular, if they are contrary to the *jus natural^* are to be rejected? Ignorance of the civil law may sometimes be condoned, but ignorance of the natural law is always to be condemned in those of mature years.¹ And finally, no dispensation from the natural law can be accepted, except in the case when a man is compelled to choose the lesser of two evils.²

These are strong and sweeping phrases of Gratian, but they only express a judgment which is repeated by all the canonists of this time. The first commentator on Gratian, Paucapalea, restates Gratian's principles, the *jus naturale* is contained in the law and the Gospel, and commands us to do to others as we would that they should do to us; it began with the beginning of rational creation, is superior to all other laws, and admits of no variation, but is immutable.³ We have already quoted part of the important passage in which Rufinus discusses the character of natural law;⁴ in the same passage he goes on to treat of the relation of this to other systems of law. He had begun by saying that the *jus natural#* was a principle implanted in human nature, teaching men to do good and to avoid evil; but, he says, the power of this principle was so much weakened after the sin of the first man, that mankind almost came to think that nothing was unlawful; natural law was, in part, re-established by the Decalogue, and completely by the Gospel? This treatment of the subject is interesting, and is probably derived from the patristic discussions of the subject.¹ In another passage he interprets a phrase of Augustine as making truth and reason equivalent to the precepts of the *jus natural?** ID another place he takes a reference of Gratian's to the Canonical Scriptures as implying that he holds them to be the same as *instituta naturalia*.³ Such is the authority and sanctity of the natural law, and we therefore find him repeating in emphatic phrases Gratian's principles, that all laws contrary to the natural law are null and void. In one passage he draws this out with much force; in these three points especially does the natural law differ from the law of custom or constitution—namely, in its origin, its breadth, and its dignity : Gratian had already discussed its superiority in origin and breadth, but now drew out again its

superiority in dignity, saying that whatever custom or constitution there might be which was contrary to the commands and prohibitions of the natural law was null and void, for the Lord said, “I am the truth,” not, “I am custom or constitution.” * And again, in a later passage, Bufenus says more emphatically still: “Whatever there may be in the laws of the emperors, in the writings of authors, in the examples of the saints, contrary to natural law, we hold to be null and void.” ⁵

Finally, he restates Gratian’s principle that no dispensation can be given from the rules of the natural law, except in the case when a man has to choose between two evils, as for instance if a man has sworn to kill his own brother.¹ Damasus, a canonist and civilian of the beginning of the thirteenth century, discusses the question of the authority of Natural Law in his “Burchardica,” citing the authorities on each side, and himself, as we understand, concludes that the *jus naturals* is unchangeable, even by the Pope himself.² And finally Pope Gregory IX., in one of his Decretal letters, adopts and confirms the principle that no custom can override the *jus naturals*, and that any transgression of it endangers a man’s salvation.³

A consideration of these passages seems to make it abundantly clear that these canonists look upon the law of nature primarily as equivalent to the general principles of the moral law—principles which are derived directly from God, and which are antecedent to and superior to all positive laws of any sort, whether ecclesiastical or secular. So far the

subject is clear, and no special difficulty has presented itself; but we must now consider a real difficulty, which arises from the fact that the *jus naturals* has been said to be contained in “the law and the Gospel,” while actually there is much in the “⁴⁴ law ” which is no longer obeyed. And again, the *jus naturals* is said to be immutable, while actually conditions of life now exist, and are allowed to exist, which are contrary to the principles of the *jus naturals*. We must consider these two questions separately ; and first. How is it that the “Divine Laws ” contained in the “⁴⁴ law and the Gospel ” have actually been changed ?

It is Gratian, in his attempt, to construct an intelligible system of Church law, who first among the canonists faces this question. Natural law, he says, is first in dignity, as it was first in time, beginning with the rational creation, and it is immutable; but the natural law is said to be comprehended in the “⁴⁴ law and the Gospel,” and yet men are now permitted to do things which are contrary to the “⁴⁴ law.” It would seem, then, that the natural law is not immutable. Gratian takes as an example the law that a woman was not allowed to enter the temple for a certain number of days after the birth of her child; nowadays a woman may enter a church and receive the Holy Communion at any time. Gratian replies to the difficulty by making an important distinction with respect to the “⁴⁴ law ” and its relation to the *jus naturals*. It is true, he says, that the *jus naturals* is contained in the “⁴⁴ law and the Gospel,” but not all that is in the “law and the Gospel ” belongs to the *jus naturals*. There are in the “law ” moral precepts, such as “^{&i} Thou shalt not kill ”; but there are also *mistica*, such as the regulations about sacrifices; the moral precepts belong to the natural law, and are immutable; the *mistica*, as¹ far as their external character is concerned, do not belong to the *jus naturals*—they only belong to it in their moral significance ; they are therefore liable to alteration in the former sense, while in the latter they are immutable.¹ Gratian’s

critical explanation is of great importance ; and it is especially noteworthy that he should so frankly recognise that positive law, even when it claims the authority of God Himself, is not unchangeable. This is repeated by Rufinus?

We must turn to the second question. The *jus naturals* is said to be immutable. How is it, then, that conditions are allowed to exist which are contrary to this law ? Gratian, in dealing with the institution of property, points out that there is a difference between the *jus naturales* and custom or constitution, for by the law of nature all things are common, and he illustrates this not only from the practice of the primitive Church, but also from the Platonic doctrine of the most just form of State. It is by the law of custom or of “constitution” that one thing may ‘be said to be “mine” and another “thine.” Gratian then cites the passage from St Augustine’s treatise on St John, which maintains that property is the creation of the law of the State? Gratian points out the contrast between the *jus*

naturals and the actual order of society in this matter, but he does not furnish us with an explanation. This omission is repaired by Rufinus, who deals with the matter very carefully. We have already discussed the first two sections of his treatment of the natural law in commenting on Gratian’s first Distinction.¹ We must now consider the rest of this important passage. After describing the character of the natural law as the moral principle implanted in man, and its division into commands, prohibitions, and demonstrations, he argues that the force of this was so much weakened after the Fall that it had to be re-established in part by the Decalogue, and finally and completely by the Gospel. He then proceeds to show how the abstract and general character of the principles of the *jus naturalis* made it necessary for additions to be made to it by good customs; and he gives as an illustration the institution of the rules and ceremonies of marriage. So far for the additions (*quod adactum est*) to the law of nature which are to be found in the institutions of society. The subject of conditions contrary to the principles of the natural law (*quod detractum est*) presents greater difficulties. Rufinus explains this as follows. Referring to his analysis of the *jus naturals* into commands, prohibitions, and demonstrations, he explains this last phrase as indicating those things which the *jus naturals* neither forbids nor commands, but shows to be good; as a special illustration he mentions the liberty of all men and the common possession of all things: these phrases are taken from Isidore’s definition of the natural law as quoted by Gratian? These conditions belong to the natural law, while under the civil law this man may be my slave, this field may be your property. Rufinus explains this by saying that such conditions, contrary as they may seem to the natural law, in reality carry it out-

To take the case of slavery, some men living without a master followed their own unrestrained desires and committed all manner of crimes with impunity, and it was therefore ordained that such men should be made perpetual slaves. The object of this was that such men, who had been full of pride and were injurious to others so long as they were free, should be rendered humane, humble, and innocent by the discipline of slavery. No one can doubt that as pride and ill-will are contrary to the *jus naturals*, so innocence and humility are proper to it?

Rufinus’s statement is interesting and suggestive; it is, of course, not in any sense original, for he is only putting into other terms the explanation of the contradiction between the law and institutions of nature, and the actual law and institutions of the world, which had been suggested by Seneca, and drawn out at length by the Bathers.

Rufinus's statement serves to remind us that the mediaeval theory of society rests upon the assumption that the conventional institutions of society are the results of sin, and are intended to check and control sin. We shall come back to this when we deal with the theory of slavery and property.

Bufinus' explanation is briefly repeated by Stephen of Tournai in the conclusion of that passage of which we have already quoted a part.¹ He also divides the natural law into commands, prohibitions, and demonstrations : commands, such as to love God; prohibitions, such as not to kill; and demonstration[®] such as that all men should be free. Custom has, however, added to and taken from the "natural law," it has added to it such things as the rules and ceremonies of marriage, it has taken away from it not with regard to its commands or prohibitions, but with respect to its demonstration^{*}, as in the matter of liberty, for the *jus gentium* has introduced slavery?

To the medieval canonist then, as to the Fathers, the *jus natural[®]* is identical with the law of God, it is embodied in the "law and the Gospel," for it represents the general moral principles which God has implanted in human nature, and it is, in its essential character, immutable. It is true that it is set aside by some of the legitimate institutions of society, but this is to be explained as a necessary accommodation to the corrupt state of human nature, and this is justified by the ultimate purpose of setting forward the principles of the *jus natural[®]*. The *jus natural[®]* is to the canonists the norm by which any law or institution must be tried.

CHAPTER IV.

THE /W

WE have considered one term of that tripartite definition of law which the Middle Ages inherit from the *corpus juris* and Isidore of Seville. We must briefly consider the meaning which the canonists attach to the second kind of law, the *jus gentium*. Gratian's definition of this is taken from Isidore, and is therefore not quite the same as the definition of the Digest or Institutes of Justinian¹

Gratian looks upon the *jus gentium* as one part of the customary law of mankind. As we have already seen, he has set out a distinction which, as we may gather, he considers to be more fundamental than the tripartite definition of law, the distinction between natural law and custom,— a distinction which corresponds to that between the Divine law which exists by nature, and the human law which exists by custom.² The *jus gentium* is a form of customary law, distinguished from the *jus civile*, because the former represents the custom of mankind, the latter the custom of some particular State. This seems to be clearly implied by Gratian and by Bufinus. The law of nature, Gratian says, began with the beginnings of the rational creation, and continues unchangeable; the law of custom came after the law of nature, and began from that time when men commenced to dwell together; it was only later that the *jus constitutionis*, that is, a system of written law, began: the first example of this, Gratian, repeating Isidore, finds in the legislation of Moses, and this was followed by other legislators.¹ Paucapalea repeats the greater part of Gratian's phrases with little change or addition of any significance.² Rufinus also has an account, of the beginnings of human societies, and of the origin of the general laws and customs of mankind, and he explicitly identifies these with the *jus gentium*. He describes how by the Fall man's sense of justice and capacity for knowledge were greatly impaired; but inasmuch as his natural powers were not wholly destroyed, he began to understand that he was different from the brute animals

both in knowledge and manner of life, and he began to seek his neighbour's society and pursue the common service; the embers of justice which had been almost extinguished began again to burn, that, is, the rules of modesty and reverence, which taught men to enter into agreement with each other,—and these are called the *jus gentium*, because almost all races of men obey them.⁸

CHAPTER V.

THE THEORY OF SLAVERY,

WE have now considered the character of the *jus natural* as the norm and standard of all just law, and have seen that in the judgment of the canonists it is immutable—that, properly speaking, no institution is lawful, no law is valid, which is contrary to it. But we have also seen that certain institutions are mentioned by the canonists as being contrary to the natural law, especially the institutions of slavery and property, and we have already considered those distinctions within the natural law, by means of which Rufinus and Stephen of Tournai seek to vindicate their legitimate character. Natural law, they say, consists of three parts—commands, prohibitions, and demonstrations; and while the commands and prohibitions are unalterable, the demonstrations have not the same character, and it may even be necessary that the natural law, under this aspect, should be formally disobeyed, in order that its true ends or purposes may be fulfilled. We must now consider more closely the theory of the canonists with regard to the institutions of slavery and property, and must endeavour to ascertain more precisely their views with regard to them. And first we must deal with slavery.

The canonists inherited from the later philosophers of the ancient world, from the *corpus juris civilis*, and from the Fathers, the principle that by nature all men are free and equal, that slavery is an institution not of nature or the natural law, but of the *jus gentium* or the civil law. We have already considered this principle as held by the civilians of

the Middle Ages, and it is not necessary to cite many passages to prove that this was the doctrine also of the canonists. The equality of human nature is indeed the doctrine which is assumed by them all as the fundamental principle of human life—that is, the equality of men, as being all the children of one Father in heaven.

Burchard of Worms embodied in his ⁴ *Decretum* that canon, which we have already quoted in the previous volume, in which Christian men are admonished to remember that behind the diversity of the conditions of human life there lay the fact that men were all brethren, for they were the children of one Father, that is God, and of one mother, that is the Church, and that therefore they were bound to treat each other mercifully and considerately, and not to exact from each other more than was reasonable.¹ This is again included in the ⁴ *Decretum* of Ivo?

This principle is regarded as determining the nature of the marriage relations of slaves, and a canon in Burchard's ⁴ *Decretum*⁹ lays down the rule that if a free woman knowingly married a slave, he was to be reckoned as her husband, "For, we all have one Father in heaven;"³ this is also contained in the ⁴ *Decretum* of Ivo? Ivo and Gratian include in their collections a canon which prohibits the dissolution of the marriage of slaves, on the ground that as God is the Father of all men, the same law is binding upon all in things related to God? We shall have to return to the

question of the marriage of slaves; in the meanwhile these passages will serve to bring out clearly the fact that the canonists assume the principle of the equality of human nature.

The doctrine of the natural freedom of men is in the same way inherited by the canonists from the Civil Law and the Fathers, and assumed by them as true. It is sin, not nature, that has made some men free and some slaves; the origin of slavery is to be found not in some inherent and natural distinction in human nature, but in the fact that sin, as it has depraved men's nature, so it has also disordered all the natural relations of human society, and man now needs a discipline which in his original condition would have been as unnecessary as it would have been unnatural. Burchard of Worms cites that very important saying of St Isidore's, which describes slavery as a consequence of the sin of the first man,—a punishment, but also a remedy by which the evil dispositions of men may be restrained? Paucapalea, the first commentator on Gratian, comments on the phrase *servitutes* in Isidore's definition of the *jus gentium*, as cited by Gratian, by quoting the words of the Institutes that by the law of nature all men were born free.⁸ We have already considered the important passage in which Eufinus discusses the question of the apparent contradiction between the law of nature and the civil law with regard to slavery. Eufinus does not express his views in the same strictly theological phrases as Isidore and the Fathers, but his explanation of slavery is substantially the same. Natural law shows that freedom is a good condition, and slavery would at first sight seem, to be contrary to this, but its real purpose is to correct men's evil desires and criminal passions, and to produce those qualities of humility and innocence in which the natural law is fulfilled. Freedom is, indeed, that condition which is agreeable to natural law, but men are not yet fit for that condition.¹

The canonists, then, like the Fathers and the jurists, recognise that slavery is contrary to natural law—that is, it is a condition adapted not to the ideal of human life, but to the actual imperfections of men's nature. But the canonists, like the Fathers, while they hold that slavery is not a natural institution, not only tolerate it, but justify it; they not only acquiesce in the institution, but hold that it serves a useful purpose. The strongest illustration of this attitude of the canon law to slavery is to be found in this, that it recognises and provides for the fact that the Church was itself a slaveowner. We find a series of regulations from the canonical collections of Bego of Pavia in the ninth century to the Decretals of Pope Gregory IX. in the thirteenth century which deal with this. •

Bego includes in his collection some sentences from a canon of a Council of Toledo which strictly forbid a bishop to emancipate slaves who belong to the Church unless he gives of his own property to the Church; if any bishop should emancipate Church slaves except under these conditions, his successor is to reclaim them.² Bego also cites a canon which forbids an abbot to emancipate slaves who have been given to a monastery, for it is unjust that while the monks do their daily agricultural work the slaves should live in idleness?

Burchard of Worms includes the first of these canons in his *Decretum*,¹ while Ivo of Chartres reproduces both. Gratian states the same principles in connection with the ordination of slaves. He discusses the question whether the slaves of a monastery can be ordained, and points out that it may be argued that this is impossible, for no one can be ordained unless he is emancipated, and he cites as a canon of the eighth general council

what is really a passage from the ⁴ *Regula Monachorum*,’ attributed to St Isidore of Seville, which lays down the rule that no abbot or monk can emancipate a slave. He replies to this by urging that while it is quite true that the slaves of a monastery cannot be emancipated in such a sense that they could leave the monastery, they can be ordained and so emancipated under the condition that they are to continue in the monastery—that is, as we understand, under the condition that they are admitted as monks; and he cites a passage from Gregory the Great which expressly authorises the admission of a slave of the Church into a monastery? Gregory IX., in his *Decretals*, repeats the canon of Toledo, which, we have already cited from Bego of Pram, the canon which forbids a bishop to emancipate slaves belonging to the Church unless he gives property of his own to the Church?

These passages will suffice to make it clear that the canon law accepted and sanctioned the institution of slavery, for they assume that the Church itself was a slave-owner. But the medieval canon law goes further than this, and repeats from earlier Church authorities the very severe condemnation of those who encouraged slaves to fly from their masters, and of fugitive slaves. Burchard of Worms cites that canon of Gangrae, which we have discussed in the previous volume, in which the anathema of the Church is pronounced against those who teach slaves to despise their masters and to fly from them, and also part of the letter of Hrabanus Mauras which comments on this and discusses the question whether it was lawful to say mass for a slave who had died while in flight.² Burchard also cites a canon of the Council of Altheim which professes to repeat a saying of Gregory the Great, that a cleric flying from his church, or a slave flying from his master, is to be excluded from communion until he return? Ivo of Chartres repeats these two canons in his ⁶ *Decretum*,⁴ while Gratian cites the canon of Gangrae? The canonists clearly look upon the institution of slavery as in such a sense authorised and sanctioned by God that any revolt against it was sinful.

We have just cited a passage from Gratian which refers to the question of the ordination of slaves, and we must now turn to this subject, for it serves to illustrate very clearly the degree in which the Church accepted the institution of slavery. There is no need to go through the evidence in detail, for the canonists restate those same general principles with regard to the subject which we have discussed in the first volume? The slave must not be ordained until he has been emancipated? and the emancipation must, in the case of slaves of lay masters, be absolute and complete—that is, the master cannot retain the *jus paironii*;³ the Church, on the other hand, always retains these rights, even over those who are emancipated and ordained? That is, the master can retain no rights of an ordinary kind: from other canons it would appear that the master might retain the right to the services of the emancipated slave as a minister of a church on his property?

According to a canon in Regino’s and Ivo’s collections, if a slave is ordained by the bishop, knowing that he is a slave, but without the knowledge and consent of his master, he is to continue in his office, but the bishop is to pay double his value to the master; if the bishop was ignorant that he was a slave, then those who testified to his character, or who presented him for ordination, are to pay this compensation? According to a canon in Burchard, which comes from the ⁴ *Capitula Ecclesiastica* ’ of 818-19 A.D., a slave who procures his ordination by fraud is to be restored to his master; if he procured ordination, being himself ignorant of the fact that he was a slave, his master may grant him his

liberty, and the slave will then remain in his order, or he may reclaim him as a slave, and he will then lose his order? This canon is also found in Ivo's ⁴ *Decretum*/ and was inserted as a *Palea* in Gratian's ⁴ *Decretum*.¹ It would seem, however, that this canon does not represent the judgment either of Gratian or of his commentators. Indeed even Burchard and Ivo have also cited canons which represent another judgment. Burchard cites a canon which prescribes that though a slave who has been ordained is to be restored to his master, he is to continue in his order? Ivo cites a passage from a letter of Pope Gelasius I., which enjoins the restoration of the ordained slave to his master, but also provides that the slave who has been ordained priest, while he is to be sent back to his master, is to serve him as a priest;³ and he also cites another letter of Gelasius which does not allow a priest to be degraded, but punishes him with the loss of his *peculium*, while slaves in the inferior orders are simply to be restored to their masters? Gratian cites both these letters of Gelasius, and states his own judgment as being that, if a slave has been ordained without his master's consent, ■ a priest' is to be deprived of his ⁴⁴ *peculium*," a deacon is to find a substitute, or, if he cannot do this, to be reduced to slavery, while those in other orders are simply to be reduced to slavery? There

might seem to be some uncertainty about Gratian's meaning; at first sight it would seem as though the priest were not to be restored to his master, but only to forfeit his "peculium," but the fact that he cites the passage from Gelasius which orders him to be restored to his master, but only in order to serve him as a priest, would seem to indicate that he approves of this, but does not understand this as equivalent to the reduction of the priest to slavery. *Paucapalea* restates the judgment of Gelasius (*Epistle xx.*) as to the priest.¹ Eufinus sums up the whole matter in a passage introductory to Gratian, *D. liv.* If, he says, a slave is ordained with the master's knowledge, and the master says nothing, the slave is free; if the slave is ordained against the declared wishes of the master, he must be reduced to slavery and lose his order, even if he is a priest, and he refers for proof to that canon of Burchard which we have already quoted,—it would seem that Eufinus did not know this as a *Palea* in Gratian's *Decretum*. This canon prescribes that a slave who has been ordained without his master's knowledge may be reclaimed by his master and degraded; Eufinus urges that if this were true of a man ordained to the priesthood without his master's knowledge, much more would it hold in the case of a man ordained against his master's declared will. Then, however, Eufinus considers over again the case of a slave ordained without his master's knowledge, and repeats Gratian's own judgment that in this case the man in subdeacon's orders, or in inferior orders, is to be reduced to slavery, the deacon is to find a substitute or to return to slavery, while the priest is to be punished only with the loss of his *peculium*, and is in no wise to be reduced to slavery—unless, Eufinus adds, the man or his parents fled from their master, as in the case contemplated in Burchard's ■ canon. Finally, he adds, some may maintain that the regulation represented by Burchard's canon, is annulled by the decree of Gelasius on which Gratian's own

saying is founded (Gratian, ' *Decretum*, ' *D. liv. c. 9*) J These canonists evidently held what was substantially the same principles as the Fathers; if anything their views are rather more strict with regard to the rights of the master over his slave if he should have been ordained. It is, however, worth while to notice that some of the canonists have taken over from Justinian the principle that the master can only reclaim his slave who has been

ordained within a certain time; Ivo includes in the 'Panormia' the provision of the Novels that if a slave is ordained without his master's knowledge the master can reclaim him, but only within a year. This rule is also cited by Gratian.² ■

Very similar rules are cited by the canonists with respect to the admission of slaves into monasteries. Burchard and Ivo cite a canon prohibiting a slave from entering a monastery

without his master's permission,¹ but again Ivo in the 'Panormia' quotes the regulation that while an unknown man who seeks admission to a monastery is not to receive the habit within three years, and if he should prove to be a slave his master can reclaim him within that time, yet after that time he cannot be claimed; and this rule is restated by Gratian and Rufinus? Stephen of Tournai also repeats this rule, but adds that there was some doubt as to the proper ■ course if the abbot had given the slave the tonsure and made him a monk before the three years were over; some, he says, maintained that in this case the slave was not to be restored to his master, but that the abbot should be required to find another slave of equal value and give him to the master.³ We must notice that the canonical regulations are not so favourable to liberty as the provisions of Justinian's Novels, for these only allowed a slave to be reclaimed from a monastery, even within the first three years, if he had committed some crime? We have already cited the passages in Gratian which deal with the question of the ordination of the slaves of a monastery; they may not be emancipated and ordained under such terms as that they could leave the monastery, but they can be ordained on condition that they are perpetually to minister in and for the monastery.⁵

With regard to the ordination of the freedman and the inscriptitius, Gratian cites two regulations, but they are not in harmony with each other: the first forbids the ordination of any person who is under any servile obligation without the consent of the person to whose service he is bound,¹ while the other provides that the inscriptitius can be ordained without the permission of his master, but that if so ordained he must continue to discharge his agricultural task, this latter regulation is taken from the Novels. Gratian himself says that no freedman can be ordained unless the master surrenders his rights as ⁴⁴ patron? ³ It is important to remember that the civilians look upon the ■ as a free man rather than a slave, and that Azo held that he could be ordained without his master's consent?

It is clear, then, that the mediaeval canon law, while maintaining the philosophic and Christian doctrine of the equality of human nature, and while declaring that under the law of nature all men are free, yet very clearly defended and sanctioned the institution under the actually existing circumstances of human life, while the mediaeval Church recognised it, by itself holding slaves and by refusing to allow the ordination of the slave. We must now, consider how far the influence of canon law tended to mitigate the conditions of slavery, and how far, in spite of its formal theory, its influence tended to bring the institution to an end.

The Church gave the weight of its authority to the provisions of the Roman law which restrained the arbitrary power of the master and protected the slave, and lent the sanction of its own penalties to the enforcement of those laws, while in relation to the marriage of the slave it went further than the Corpus Juris Civilis. We have seen that both Placentinus and Azo deal very stringently with the master who ill-treats or kills his slave; they hold that a master is liable to be

proceeded against for homicide, as though he had killed a freeman.¹ Regino of Prum cites a canon which imposed upon the Bishop in the visitation of his diocese the duty of inquiring whether any slave-owner had killed his slave without legal proceedings,² and another canon which imposes the sentence of excommunication for two years upon any slave-owner who has done this? These regulations are repeated by Burchard of Worms? Begino also reproduces from the Theodosian Code a regulation that, in the division or sale of properties, care should be taken that husbands and wives, parents and children, should not be separated from each other? Gregory IX., in the Decretals, reproduces and amplifies the doctrine of the ancient Roman law, that a slave deserted or exposed in infancy or illness is to be reckoned as emancipated? Ivo and Gratian include in their collections canons which extend the protection of the Church to the freedman, and provide that any person who attacks their liberty, without a judgment of the courts, is to be excluded from the Church?

So far, the Church law does not do more than reinforce the civil law, but the most important aspect of the relation of the canon law to the condition of slavery is to be found in the treatment of the marriage of slaves with slaves, or of slaves with free people. We have just considered the rule which Begino takes from the Theodosian Code, that the slave husband and wife were not to be separated from each other;^a this is a humane conclusion from the principle that the marriage of a slave, if contracted under legal conditions, is indissoluble, like the marriage of free people. This principle is expressed very emphatically in a canon contained in the collections of Burchard, Ivo, and Gratian? It must, however, be noticed that according to this canon, if the marriage is to be indissoluble it must have been contracted with the consent of the master: a marriage without this consent is, we may infer, illegitimate. This is expressly stated in the latter part of Begino's canon; the slave wife is to be bought or sold with her husband, unless she is the slave of another master; the law strictly forbids a slave to marry the slave of another master (presumably without the master's leave); such a marriage is to be held null and void, and to be reckoned as adultery? On this point we can trace a definite development in the canon law, for, in one of his Decretals, Hadrian IV. laid down the rule expressly that, inasmuch as in Jesus Christ there is neither free nor slave, and the sacraments are open to all, so also the marriages of slaves must be not prohibited; even if they are contracted against the will of their masters, they are not to be dissolved by Church authority, but the married slaves must discharge their accustomed services to their masters.¹ The canonists also deal carefully with the question of the marriage of free men or women with slaves. Burchard cites a canon which lays down the broad principles on which the matter was decided. If a free man marries a slave woman, not knowing that she was a slave, he is to redeem her from slavery if he can; if he cannot, he is free to marry another wife. If, however, at the time of marriage he knew that she was a slave, the marriage is valid; and so in the case of a free woman who marries a slave? This canon is reproduced by Ivo in the * Panormia/³ and Gratian discusses the whole question carefully, and concludes in terms which agree with those of Burchard's canon?

Again, the Church offered a certain protection to the slave by its rights of sanctuary. In an appendix to the work of Regino of Prum there is a canon which lays down the rule that if a slave who has committed some fault flies to the Church, the master is to swear not to punish him for the

fault, and he is then to be restored to his master; if the master breaks his oath he is to be excommunicated. This canon is repeated by Burchard, and by Ivo in the 'Panormia.'¹ Ivo's 'Panormia' contains another canon which sets out that not only the Church and its court, but also the house of the bishop, are to be reckoned as sanctuaries, that no one may venture to take from thence a fugitive slave or criminal, and that the rulers of the Church are to obtain for him a promise of immunity. This canon is repeated by Ivo in the 'Panormia,' and in part by Gratian.² These canons, however, must not be misunderstood: the Church offers a certain protection to the slave through the right of sanctuary, but the Church must not finally detain the slave, or allow him to escape from his master by seeking its protection. Ivo's 'Decretum' contains a canon drawn from a letter of Pope Gelasius I., which lays this down very explicitly; the authorities of the Church must restore the fugitive slave, even against his will, to his master, after they have obtained from him an oath that he will not punish the slave; Gratian reproduces the canon,³ and Pope Innocent

III. lays down the same principle very clearly in the ⁴ Decretals? ¹

One form of enslavement the Church law, following the secular jurisprudence, did prohibit and punish—that is, the kidnapping and enslavement of free Christians. The Theodosian Code punished with death those who kidnapped children;^a Regino of Brum embodies this law in his work, and condemns especially the sale of Christians to the heathen;³ Burchard's ⁴ Decretum' contains similar regulations;⁴ and Deusdedit's ⁴ Collectio Canonum contains a provision against the sale, presumably of Christian men, embodied in the oath of allegiance of Demetrius, Duke of Dalmatia, to the Pope.⁵

Finally, though the Church acquiesced in and sanctioned the institution of slavery, and though it did itself possess slaves, yet the canonists furnish us with continued evidence that the Church looked upon the emancipation of a slave as an action meritorious and acceptable to God. Regino and Ivo include in their collection a formula of manumission which expresses very clearly the conviction that he who releases his slave from bondage will be rewarded by God; and this formula is quoted by Burchard,⁶ and Gratian reproduces an even more significant statement by St Gregory the Great, in which he describes the purpose of the Incarnation as being to break the chain of slavery by which men are bound, and to restore them to their primitive liberty; and urges that it is therefore a good action to give back to men, who in the beginning were brought forth by nature free and whom the *jus gentium* had subjected to the yoke of slavery, that liberty in which they had been born.¹

CHAPTER VI.

THE THEORY OF PROPERTY*

IN private property we have a second important example of an institution which is recognised by the canonists as being contrary to nature and natural law, and as yet actually and legitimately existing. We must examine the apparent contradiction, and consider how far the canon law has a definite theory of the institution of 'property, and of its rights and limitations. The theory of the canon law is founded directly upon that of the Christian Fathers. We have endeavoured to set this out in our previous volume,¹ and cannot now restate this. The canonists assume the general principles of the theory, but they also draw them out in a careful and deliberate fashion.

There are several incidental references to the theory of private property and its origin in the earlier collections of the canon law, but it is not till we come to Gratian that there is anything of the nature of a systematic exposition of the subject. It is, therefore, with his treatment of the institution that we begin. In defining the difference between the law of nature and the law of custom, Gratian says that by the law of nature all things are the common property of all men; and that this principle was not only followed in the primitive Church of Jerusalem, but was also taught by the philosophers; it was thus that Plato excluded the desire for property from the most just form of State.² Gratian takes his principle from the patristic theory, and illustrates this with that important passage from St Augustine, with which we have dealt in the first volume, in which it is very explicitly and emphatically laid down that private property is the creation of the State. In another part of the * Decretum ⁵ Gratian cites an important passage from a spurious letter of St Clement in the pseudo - Isidorian collection, in which it is stated that the use of all things in the world ought to be common to all men, but through iniquity it has come about that men claim things as their private possessions, and the writer refers to Plato and to the example of the Apostles and their disciples.¹

Here, then, we have the technical doctrine of Gratian with regard to private property. It is not a primitive or natural institution—it does not belong to the ideal or perfect life; the origin of private property must be looked for in sinful appetite, and rests upon the sanction of custom and of the civil law. This does not mean that in the view of Gratian or other canonists property is a sinful institution. We have already explained, in dealing with slavery, how in the opinion of the canonists, following the Fathers, an institution may arise out of some sinful condition or desire, and may yet be useful in correcting the consequences of such sinful passions.

It is important now that we should make, clear to ourselves that Gratian's theory of the origin and nature of property represents the general tradition of the canon lawyers. Ivo of Chartres in the ⁴ Decretum ' and the ⁴ Panormia ' had already cited that passage from St Augustine to which we have just referred, and in the ⁴ Decretum ³ another passage from St Augustine which repudiates the claim of the Donatists to hold their property because they had acquired it by their labour;¹ we may infer that he took these passages to be characteristic of the doctrine of the Church as to private property. Rufinus deals with the theory of property in the same passage as that in which he discusses the theory of slavery. He holds with Gratian that by the law of nature all things should be held in common, but this principle, he says, belongs not to the commands or prohibitions of the natural law, but to its demonstrations#; the two former cannot be altered by human custom or law, but the latter may be changed, and thus, as a matter of fact, private property now exists by the civil law, and the change is legitimate because it is thus that under the actual conditions of human life the natural law itself is preserved? Private property is not an institution of the natural law—does not belong to the ideal character of society or human nature, but under the actually existing circumstances of the imperfection and vice of human nature it represents the best arrangement, that can be made, and does actually in the long-run tend to fulfill the principles of the natural law. This is put again by Ilufinus in another place where he explains that when, in the passage from the letter of St Clement (from pseudo-Isidore), it is said that it was by iniquity that men came to claim things as their private property, this may have been true originally, but now by long custom this

has become lawful and unblamable? Stephen of Tournai, a little later than Rufinus, follows him in explaining how the demonstrationes of the natural law have been modified with respect to such principles as that of the common ownership of all things; but he also maintains that prescriptions and other modes of acquiring property have been sanctioned by the *jus divinum* or the canon law, which is divine, and that thus, while there is no private property by the *jus diuinum*, that is the *jus natural*®, there is private property by the canon law which has been made by men, but with God's inspiration? We shall have to deal with the relation of the canon law to the *jus divinum* when we discuss the theory of the canon law itself; in the meanwhile we can only observe that Stephen clearly thinks that the canon law has given its sanction to private property, and that involves, in some sense at least, the authority of God. The conception is important, but it is not strictly novel, at least in substance, for it is, as we have seen, a part of the patristic theory of the great conventional institutions of human society that, while they are related to vicious impulses in human nature, they represent the divine remedies for these vicious characteristics.

Private property is then, according to the canonists, a thing legitimate and useful, resting upon the authority of the State, and, according to Stephen, upon the sanction of the canon law. This does not, however, mean that the principle that private property is not an institution of the natural law is of no importance,—is a mere abstraction which exercised no influence upon their conception of the rights and limitations of property. On the contrary, it would seem probable that two principles which the canonists lay down with regard to the ownership and use of private property are closely related to this theory. The first is, that no one has the right to take for himself more than he needs. Gratian cites a very important passage as from St Ambrose, which denounces as most unjust and avaricious the man who consumes upon his own luxury what might have supplied the needs of those who are in want, and maintains that it is as great a crime to refuse the necessities of life to those who need, as to take from a man by force.¹ In another place Gratian refers to a saying which he attributes to St Jerome—it is really from a spurious work—that the man who keeps for himself more than he needs is guilty of taking that which belongs to another.¹ These are broad and far-reaching statements, but there are some qualifying phrases. In another Distinction Gratian quotes a sentence from St Augustine which is important as furnishing a practical commentary on such phrases as those which have just been cited. The rich, St Augustine says, are not to be required to use the same food as the poor, but must be allowed to use such food as their habits have made necessary to them : they ought, however, to lament the fact that they require this indulgence? Rufinus evidently felt that there was some difficulty in reconciling these phrase^ and endeavours to explain them. His own judgment seems to be that the obligation of providing for those in want, and especially for those in danger of starvation, is absolute, and concludes that the man who does not help those who are dying of hunger, when he is able to do so, is actually their slayer? The second principle is stated in the Decretals, and is this, that a man can only be said to possess that of which he makes a good use; the man who makes a bad use of his property has really no right to his property at all?

These principles are most probably connected with the judgment that nature gave all things to men for the common use. It is true that the appearance of vice, and especially of avarice, made it necessary to establish the system of

private property; but behind the right of private property there still remains the more general right of all men to what they need. The institution of private property may be necessary under the actual circumstances of human life, but it is really intended to set some restraint upon that instinct, and must not be taken as equivalent to a right to stand between a man and his needs. We shall in a later volume discuss the theory of property in St Thomas Aquinas; we may at once observe that he was not afraid to carry out these principles to the conclusion that the charitable man who sees his fellow-man in want, and has not wherewith to help him, may without moral fault take the rich man's property and give it to the needy? The canonists, as far as we have seen, down to the time of the Decretals, did not draw this conclusion. On the contrary, Gratian cites a sentence from a sermon of St Augustine which strongly condemns the latter doctrine, and treats it as a suggestion of the devil? At the same time, it is perhaps worth while to notice that Regino and Burchard cite a canon which suggests that the Church recognised that the moral offence of the man who was in want and stole another man's property was small,—the penance imposed in such cases is very slight?

CHAPTER VII.

THE KATLEE OF SECULAR AUTHORITY.

THE canon lawyers of this period do not present us with any complete dismissal of the origin and nature of civil society and government. Much that is of importance they do not refer to at all, and much else they only touch for a moment, and incidentally. And yet, when we put together their references to the subject, it becomes clear that behind their incidental phrases there lies a generally accepted theory of the nature of society, a theory which we can in a large measure reconstruct from their incidental phrases. And as we do this we shall recognise that the canonists in substance represent that theory of the nature of society and political authority which we have already recognised as developed by the Fathers. .

There is little direct reference in these canonists to a primitive condition in which men lived without an organised social life, but there is enough to show us that they held the same view as that of the Fathers and such Stoics as Seneca and Posidonius, that behind the conventions of organised society there lay a time when men had lived without any definite and ordered social relation, and without any coercive authority. Gratian says that while the natural law began with the creation of rational beings, the law of custom arose when men began to live together, when Cain built a city, and again when, after the Flood, and in the time of Nimrod, men began to be subject to each other.¹ This passage is

reproduced by Paucapalea, the first commentator on Gratian, in the introduction to his work,¹ and Rufinus speaks of lordship having begun with Nimrod, and having had its beginnings in iniquity.³ This is the same view as that of the Fathers, who all held that men were originally free from the coercive control of their fellow-men, and trace the development of coercive government to the appearance of sin in the world?

This last passage brings us to a question of great importance with regard to the political theory of the Middle Ages: the question, namely, whether the State is a divine institution like the Church, or whether it has properly no such character, but is merely an institution of man's devising, representing at best some convenience to mankind, at worst the sinful passions and ambitions of men, their lust of domination. We have pointed out in our first volume that the normal view of the Fathers is clear, namely, that while coercive government is not a "natural" institution, and is a consequence of the Fall and

related to men's sinful ambitions, yet it is also a divine remedy for the confusion caused by sin, and is therefore a divine institution. The patristic doctrine is summed up in those phrases of Pope Gelasius' letters and tractates which describe the spiritual and the temporal powers as both deriving their authority from God Himself, and this doctrine is clearly and emphatically restated by the ecclesiastical and political writers of the ninth century?

We have now to inquire what was the judgment of mediaeval political thinkers upon this subject. In our next volume we hope to discuss the theory as illustrated by the general literature of the eleventh, twelfth, and thirteenth centuries, and we shall then deal with the highly controversial writings which belong to the long struggle between the Empire and the Papacy. For the present we have to consider the medieval theory as represented in the canon law and the writings of the canonists. There is a famous saying of Hildebrand in a letter to Bishop Hermann of Metz, in which he uses very strong phrases as to the sinful character of the circumstances under which secular government first arose? Some parts of this letter are frequently quoted by the canonists; it is perhaps 'noteworthy' that this particular sentence is not quoted by them. This may be merely accidental, but it is possible that they felt that these phrases were a little too crude and controversial to be suitable for technical collections of laws and legal arguments. Not indeed that there is anything in these sentiments of Hildebrand which is strange or unprecedented; he is only putting in rather rigorous phrase the doctrine not only of the Fathers but of the later Stoics—the doctrine, namely, that in the primitive state of innocence there was no coercive authority, that this was a consequence of the loss of innocence and of men's sinful and vicious desire to lord it over each other, and this does not at all necessarily mean that Gregory VII. denied the truth of the doctrine of the Fathers, that, while coercive government is a consequence of sin, it is also a divinely appointed remedy for sin.

The canonists, we may safely say, accepted the patristic doctrine of the origin of secular government; we must now consider their theory as to its actual nature and present value. Here they are, fortunately, not only emphatic, but clear* Secular government, they hold, is an institution which represents the divine authority; it is sacred, and the man who sets it at naught is really guilty of setting at naught the authority of God Himself. This judgment can be followed throughout the whole course of that part of the canon law with which we are dealing—that is, from the ninth century to the middle of the thirteenth. ■

Regino of Drum's work contains a canon which pronounces the anathema of the Church on any who venture to resist the royal power, inasmuch as this derives its authority, according to the Apostolic teaching, from God Himself.¹ This canon is reproduced by Burchard of Worms;² while he, Ivo, and a Palea, to Gratian's *Decretum* cite passages from the Councils of Toledo which denounce the sentence of excommunication against all those who revolt against the king, inasmuch as he is the Lord's anointed? Ivo also cites a passage from a letter of Pope Anastasius II. to the Emperor Anastasius, in which he speaks of the Emperor as being appointed by God Himself to reign over the earth as His vicar? Ivo and Gratian again bring out the general principle very clearly when they cite a passage from St Augustine which lays down the doctrine that obedience to the secular authority is commanded by God, even when that authority

is in the hands of an unbeliever? (Ordinal IhuwlediL in his collection of canons, cites (hose, parage?. ir»un Romans xiiL and 1 Peter ii. which assert emphalivaHy the principle of obedience to the secular power as deriving its authority from God : ² and Burchard, Ivo, and Deusdvdit also cite a passage from a letter of Pope Innocent L, which defends the exercise of justice in criminal eiues as being derived from the authority of God Himself? Finally, the principle is laid down in the Decretals in a very important letfw of Innocent HL to the Emperor Alexius of Lonstuntinnpie— a letter to which we shall have to recur when we rival with the relations of the ecclesiastical and secular powers. Innocent LIL here affirms clearly the doctrim* (hat the authority of the king as well us of the ecclesiastic has been established by God Himself?

These passages will serve to bring out the principles of the canon law with respect to the nature of secular authority, and can hardly leave us in any doubt as to their character. But the matter is put beyond all question when we observe that in these canonical collections, just as in the writers of the ninth century, it is those definitions of Gelasius, whose importance we have endeavoured to set out in the previous volume, which furnish the complete statement of the theory, both of the nature of secular authority and also of its relation to the Church. Gelasius had carefully drawn out the conception of the two authorities which God had established in the world—the two authorities which had sometimes been united in pre-Christian times, but which in complete truth were united only in Christ Himself, who was both King and Priest. For Christ Himself had divided them—allotting to the priest his particular authority, and to the king also his,—in such a fashion that while each needed the other, each was independent within his own sphere.¹

Any careful examination of the canonists will bring out very clearly that it is this treatment of the subject by Gelasius which lies behind all their theory. In Ivo of Chartres' 'Decretum,' in Cardinal Deusdedit's ⁶ *Collectio Canonum*, and in Gratian's 'Decretum,' the Gelasian passages are cited,² and, as we shall see when we come to discuss the theory of the relations of Church and State, they furnish the normal expression of the principles of the canonists with regard to these.

It is very clear, then, that the canon lawyers of these times held that the secular and civil power is a Divine institution and represents the Divine authority. Whatever may have been said and meant in the course of the great conflict between the Empire and the Church which might seem to indicate a disposition to doubt the Divine nature of the civil authority, nothing of the kind has been admitted into the ' canon law or is suggested by the commentators.

We may here notice a theory—the importance of which, however, as far as the Middle Ages is concerned, has been greatly exaggerated,—the theory that the emperor was not, in the strict sense of the word, a mere layman, fox his unction was equivalent to some kind of consecration. "Rufinus discusses the propriety of the bishops Inking the oath of fidelity to the emperor? and argues that the fact that this was regularly done does not prow that it was right; for he says the canons do not sanction all that was done by custom. He says, however, that it may be urged in defence of this that the emperor was not wholly a layman, since he had been consecrated by his unction? It must be noticed that Rufinus only says that this suggestion may be made: he doos not say whether he agrees with it. It is perhaps worth while to notice that among the Decretals is a letter of Innocent I IL, in which, he carefully sets out the distinction

between the mode of anointing of the bishop and of the king: the bishop, he says, is anointed upon his head, while the prince is anointed on the arm. The purpose of Innocent seems to be to draw attention to the symbolical significance of these different modes of anointing, and his words certainly do not suggest that he recognised that the anointing of the prince was of such a nature as to render him an ecclesiastic? Whatever may have been said by other writers, there is no evidence that the canon lawyers, to the time of the Decretals, recognised as important the conception of a quasi-ecclesiastical character in the secular ruler.

The theory of the canon lawyers of this time is, then, perfectly clear and unequivocal, that the secular and civil power has a sacred character, and represents the Divine authority. This does not, however, mean that any manner of exercising this power has the Divine sanction or can claim the Divine authority.

- The canonists very clearly describe the nature of those functions of the State which give it this sacred character, namely, that it is its purpose or function to restrain and punish evil and to set forward justice. Burchard, Deusdedit, Ivo, and a Palea to Gratian all cite, in part or whole, that group of passages from St Isidore's *4 Sentences* which describe the proper purpose of secular authority as being to restrain evil, and the proper character of the king as being that of one who does right, while they also lay it down that it is just that the prince should conform to the laws of his kingdom.¹ Rufinus draws out at some length the important principle that an evil power—that is, the abuse of power—has no sanction or authority from God. He is discussing the meaning of some words of St Augustine's, in which he lays it down that all authority is from God, and represents either His sanction or His permission? Rufinus's comment upon the passage is to this effect. An evil authority or power is said to be permitted by God, and is therefore said to proceed from Him; but the fact that God permits sin does not mean that it proceeds from Him; an evil authority can only be said to be from God in this sense, that God is the source of all authority, but not in the sense that He approves of its abuse. Rufinus draws this principle out in positive form when, in the same passage, he goes on to lay down the two characteristics of a good secular authority, without which no authority can be held approved; these are, legitimate institution and the supremacy of justice. It is true that his explanation of these two principles is highly technical, and largely concerned with the question of clerical exemptions, but it includes the principle of just and equitable action by the public authority, that is, action governed by the principle of the proper adjustment of punishment to fault, and of the elimination of all merely private interest in the action of the magistrate.¹

The canonists, then, while maintaining the divine nature of secular authority, and while condemning revolt against this as a revolt against God, seem clearly to maintain the principles of the Fathers like St Ambrose and St Isidore, and of the ninth century writers, that the legitimacy of secular authority depends upon its being conformed to the law of justice.

We have already considered the relation of positive law to natural law, and it will be evident that this is closely related to the question we are now considering, for, as we have seen, natural law is to the canonists that body of principles which must govern the actions and relations of men in all the circumstances of life, and against which no human law or custom can prevail.

CHAPTER VIII.

CIVIL LAW AND CUSTOM.

WE have now considered the character of that “ Natural Law ” which is the norm by which all law is to be measured and judged, and have also considered the relation of the actual institutions of society to these nonnative principles. We have seen that to the Canonists, as to the later Stoics and the Fathers, there is a profound difference between the ideal character of society and its actually existing institutions : the ideal continues to be valid, but human nature being what it actually is, the vicious impulses of man having that power which they actually have, human life would be impossible without the existence of institutions and regulations which, while they are far from belonging to the ideal in themselves, are yet necessary if men are to lead an orderly life, and to make any progress towards the ideal*

We can now, therefore, consider the nature of law under the terms of the positive law of any one state. We have already discussed, in our second chapter, the general principles of the theory of law, as set out by Gratian, and especially that fundamental division of law into Divine or natural on the one side and customary on the other? It is true that under customary law more is included than the Civil law of any one state, for under this term falls the whole of that system which is called the *jus gentium*, the law which is composed of those conventional customs which are considered to be common to all mankind,—but we need say¹ no more about this now. Civil law is that body of rules or laws

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We can now, therefore, consider the nature of law under the terms of the positive law of any one state. We have already discussed, in our second chapter, the general principles of the theory of law, as set out by Gratian, and especially that fundamental division of law into Divine or natural on the one side and customary on the other.¹ It is true that under customary law more is included than the Civil law of any one state, for under this term falls the whole of that system which is called the *jus gentium*, the law which is composed of those conventional customs which are considered to be common to all mankind,—but we need say no more about this now. Civil law is that body of rules or laws

which belong to any one state: Gratian takes over from St Isidore the definition of the Civil law as that which any people or state makes for itself, for some human or divine reason,¹ but this Civil law is, according to the classification which Gratian has elaborated on the basis of St Isidore's phrases, in the beginning simply custom. This is a conception of great importance, and though we have already dealt with the statement of this by Gratian, we must consider the ■ matter again in connection with other passages in Gratian and in the works of other Canonists.

Burchard includes in his collection a phrase of St Augustine, in which it is said that in those matters as to which the Holy Scriptures have not laid down any definite rule, the customs of the people of God, or the instituta of former generations, are to be taken as law, and that this law is to be enforced like the Divine law? This phrase is repeated by Ivo, both in the ⁶ *Decretum* and the ⁴ *Panormia*/ and by Gratian. In a later chapter we shall have to consider the significance of this in relation to the theory of the Canon law: in the meanwhile, we are interested in it as indicating very clearly the importance of custom in relation to law. Again, Ivo in the ⁴ *Decretum* quotes from the Institutes of Justinian the phrase which describes that form of Jus which is established by the long-continued custom of those who are concerned? We have already quoted and discussed the very important passages in which Gratian draws out the principle that all law is, properly speaking, custom? Gratian looks upon Civil law as being in its origin nothing but the general expression of the custom of any society. We must now consider to what extent this conception is modified where there is in any society a person or body of persons who have legislative authority.

In another passage of the ^c *Decretum* Gratian lays down the principle that a Lex, which he has before defined as a written constitution, is instituted when it is promulgated, but is confirmed by the custom of those who are concerned, just as it is abrogated by their disuse; and he cites as an illustration of this principle the fact that a rule of fasting imposed as it was thought by Pope Telesphorus, and by Gregory the Great, on the clergy, was never accepted by custom, and therefore never became law. He ■ admits that it would be possible in this particular case to argue that these injunctions were rather of the nature of counsels than of commands, but he seems clearly to adhere to the principle that a law is not really established unless it is ratified by custom.¹ We shall recur to this passage when we deal with the theory of Canon Law: in the meanwhile, it is important to notice it as indicating that Gratian does quite clearly hold that even when there is in a community some person who has legislative authority, his legislation must be confirmed, and may be rendered void by custom. Gratian is here dealing with a question about which there was much discussion among the Civilians: they all maintained that custom originally had the force of law; while some ■ of them also held, as Gratian does, that no law, by whomsoever promulgated, has any real validity unless it is accepted by the custom of those concerned?

We must, however, compare with this passage certain others in which Gratian's position might seem to be different. In one place he quotes a passage from Isidore which says that custom must yield to authority, and that lex and ratio are superior to bad custom, and he seems clearly to make this principle his own: in another part of the same *Distinction* he quotes that important passage in the Code which, while recognising the great authority of custom, denies that it can prevail against ratio or lex, and then adds himself that custom is to be faithfully observed, where it is not contrary to the sacred

canons or human laws (leges).^{*} We have already noticed the words which he inserts in the passage of the Institutes which describes the system of law which arises from custom.³

These views may seem rather difficult to reconcile with each other, but as a matter of fact they are not absolutely irreconcilable, for Gratian may have held that while a law was not really valid unless those concerned did by their custom accept it, once they had thus accepted it custom alone could not abrogate it. This doctrine was maintained, as we have seen, by some of the Civilians.⁴ On the whole, it would seem that Gratian wavered between different views. When we turn to the commentators on Gratian, we find that they follow him in the general theory of the nature of law as custom, but that in some respects their theory may be different. Eufinus repeats Gratian's general principle that all positive law is really custom, whether it is written or unwritten.⁵ But he is clear that under the actually existing condition of his time, the authority of custom in abrogating laws was greatly limited. When Gratian, in a passage we have just quoted,¹ lays down the broad principle that laws are abrogated by custom, Rufinus is careful ■ to point out that custom only abrogates Canon laws with the consent of the Pope, just as custom only abrogates Civil laws with the consent of the Emperor, for the Roman people have transferred all their authority to him, and can therefore neither make nor unmake laws without his consent.² Rufinus represents the same position as that of one school of Civilians.³ Stephen of Tournai follows Gratian in placing both the *jus gentium* and the *jus civile* under the category of *mores*. His treatment of the relation of custom to existing written law is interesting but a little ambiguous. He lays down dogmatically the principle that if a people, which has the power of making laws, deliberately and knowingly follows a usage which is contrary to a written law, this usage abrogates the law: ⁵ this principle is also, we have seen, maintained by some of the Civilians? Stephen leaves the question whether the

people in his time did or did not possess this power uncertain. It is interesting to observe in the Canonists the traces of these views of the Civilians,—Gratian holding the principle that legislation, by whomsoever promulgated, has no authority unless it is ratified by the usage of the society; Stephen holding that any society which retains in its own hands the power of making laws, does by its usage abrogate any law, if it acts deliberately and consciously; Rufinus maintaining that, at least in the case of the Roman people, the authority of custom has really ceased except so far as it is sanctioned by the Emperor.

When we now turn to the Decretals, we find the doctrine that Custom overrides all law except that of Nature and Reason; only this Custom must be sanctioned by a sufficient prescription. Gregory IX. lays down this doctrine in words drawn from the famous passage in the Code, but with such additions as completely to transform its sense. While Constantine had recognised the great authority of long custom, but had also maintained that it could not prevail against reason or law, Gregory IX. held that it could not prevail against positive law, unless it was reasonable, and founded upon a legal prescription—that is, a definite, legally recognised period of time.¹ For the discussion of the important question of the appearance of this conception of a definite period of time as constituting a legally valid custom, we must refer to the very careful treatment of the matter by Professor Siegfried Brie, in his work on the doctrine of the Law of Custom. To this we would also refer the reader for a full discussion of the significance of *ratio*: we

are, indeed, under great obligations to this work in relation to the whole subject of Custom.²

It is indeed true that in some earlier Decretals the matter is treated in the terms of the rescript of Constantine in the Code;¹ but it would seem to be clear that Gregory IX. deliberately decided the matter in the other sense, and that thus, whatever may be the ambiguities in the position of Gratian and other earlier Canonists, the final judgment of the Canon Law, so far as we are here dealing with it, is in favour of the continuing supremacy of Custom over all positive law. The text of the Canon Law is not here dealing with the authority of Civil Law, but the impression which is left upon us is that the Canon Law is on the same side as those Civilians who maintained that all positive law is ultimately founded upon, and continues to be valid in virtue of, the custom of the people.

CHAPTER IX.

THE THEORY OF THE CANON LAW.

WE can now turn to the consideration of the nature and character of canon law. We could not approach this until we had endeavoured to get at the conception of law in its most general sense, for it has, in the judgment of the mediaeval canonists, in large measure the same nature as other laws, and therefore, till we had endeavoured to fix the general principles of all legal systems, we could not with any hope of success attempt to apprehend the distinctive features of the canon law. We must approach the subject without assuming that the nature of canon law was quite clearly and completely understood or defined by any writer in this period. We must be specially on our guard against the danger of reading back into the twelfth and early thirteenth centuries the possibly more complete analyses and the precise definitions of later times. It is possible that by the middle of the thirteenth century the theory of the subject was complete, but if we are to consider the matter seriously we shall do well to keep an open mind, even upon that question. Nothing, indeed, has been, from a strictly historical point of view, more mischievous than the notion that the Middle Ages had a clear-cut and precise notion of the nature and authority of canon law. What we may take as fairly certain is that until Gratian men had hardly realised the complexity of these questions, and that his treatment of the subject does present us with the first reasoned attempt to analyse the essential character of canon law: this does not, however, necessarily mean that the theory even of Gratian is complete.

The canonical collections which preceded Gratian's have, as we have already seen, the character of compilations small or large rather than of critical treatises, and there is no use, therefore, looking to them for any explicit discussion of the nature of canon law: this does not of course mean that the Church had no working conception of what it was, but it does mean that it had no fully formed and defined theory of its nature. At the same time the collections both of Burchard and of Ivo include passages from various ecclesiastical writers which may be taken as indicating the currency of some general conceptions both of the nature and of the sources of the canon law, and these and similar passages provide the foundation upon which Gratian constructed his own more definite theory.

Some passages from the writings of St Augustine, St Basil, and Pope Leo IV. are especially noteworthy in this connection. In the last chapter we have referred to the passage cited by Burchard and others to the effect that in those things with respect to which the Scriptures lay down no definite rules, the custom of the people of God and the institutions of the "maiores" are to be taken as law, and are to be obeyed.¹ Here is an

important statement of the place and nature of ecclesiastical law, as distinguished from the law of the Scriptures ; the reference to the “ *mos populi Dei* ” is especially interesting and significant, as indicating an important point of similarity between the conceptions of canon law and secular law.

Ivo places immediately after this a passage derived ultimately from St Basil, which represents a very similar principle. Some Church institutions, he says, we have received from the Scriptures and from the apostolic tradition; some have been approved by custom, and these deserve a similar respect?

Another passage from St Augustine is cited by Ivo in the ⁴ *Decretum*, which contains a very interesting enumeration and classification of the authorities in the law of the Church. The authority of Scripture is superior to that of all the letters of bishops, and no question can be raised as to the truth or correctness of that which is contained in it. The letters of bishops can be corrected by wise men or other bishops, while the judgments of councils may be corrected by those of later councils. The authority of provincial councils can be overruled by that of the universal councils of the Christian world, and that of universal councils by later ones when the Church may have received new light?

In the absence of any comment on these passages, we cannot say with confidence how far Burchard or Ivo may have derived from them a theory of canon law, and of the relation of its various sources to each other. But we can for ourselves recognise at least four elements in the sources of canon law as indicated in these passages—first, the Holy Scriptures; second, the decrees of councils; third, the writings of certain bishops ; and fourth, the custom of the Church.

In another passage quoted by Ivo in the ¹ *Decretum* and the ⁶ *Panormia*,⁵ we have a statement of the actual sources of the canon law as recognised by Pope Leo IV. in the ninth century. In this letter Pope Leo lays it down that alongside of the canons of certain councils, the courts of the Church must recognise as authoritative the decretal letters of Popes Sylvester, Siricius, Innocent, Zosimus, Celestine, Leo, Gelasius, Hilary, Simmachus, Simplicius, Hormisdas, and Gregory the Second; and that if it should chance that in some case questions should arise which could not be settled by reference to these, then recourse should be had to the sayings of Jerome, Augustine, Isidore, and other holy doctors, or to the Apostolic See of Rome.¹

This is from the point of view of historical criticism an important passage; for our present purpose it has not the same significance, for, as we shall presently see, Gratian enumerates many other sources of canon law, and it cannot be doubted that Burchard and Ivo also recognised many others; but the passage indicates clearly the importance of the position of the decretal letters of the Popes in the canon law. This point is of so much importance that we must dwell upon it a little further.

Burchard has not, so far as we have observed, any direct references to this, but he reproduces an important canon which lays down the principle that the authority of summoning synods belongs to the Apostolic See, and that no council can be recognised as general which has been called without this authority.¹ Ivo includes the same canon in the ⁴ *Panormia*, and there is a similar one in his ⁴ *Decretum* and in Gratian.² Ivo, both in the ⁴ *Decretum* and in the ⁴ *Panormia*, and Gratian cite a canon saying that all commands of the Apostolic See are to be received as though they were confirmed by St Peter.³ He also (in the ⁴ *Decretum* ⁵) cites a letter of Pope Nicholas I., which has reference

primarily to the pseudo-Isidorian collection. It had been apparently suggested that these were not to be received as having canonical authority, because they were not contained⁴⁴ in *codice canonum*.” Nicholas urges that this objection has no weight, that there is no difference between the authority of those decretals and decretal letters which had been hitherto included in the⁴⁴ *codices canonum* ” and others? Ivo also includes in the⁴ *Decretum* ’ a letter of Pope Alexander II. which asserts very emphatically that the decreta of the Roman See are to be accepted and revered by all sons of the Church, even as are the canones*

It was the great work of Gratian to take in hand seriously the task not merely of codifying the immense mass of material which had accumulated, but what was even more important, of analysing these materials, and of seriously facing the question of their relation to each other. But more than this, Gratian also for the first time among canonists set out to form some general philosophical conceptions of the ultimate nature of all law, and to apply these philosophical principles to the elucidation of some of the most difficult questions with regard to the whole body of the law of the Christian Church.

In order to deal accurately with Gratian’s treatment of Church law, we must begin by observing once again his general principles on the nature of law, though we have already considered these in previous chapters. He begins by dividing all law into natural and human. Natural law he identifies with the divine law, and says that it is represented first by the great principle that a man should do to others as he would wish that they should do to him. Human law is essentially custom: this has been in part reduced to writing, while part of it continues unwritten.¹

We have to consider how far these general principles apply to the canon law as well as to civil law. We might imagine that canon law belongs entirely to the category of divine natural law, but when we come to look at Gratian’s treatment of the subject more closely we find that this cannot be what he meant. We must refer the reader to our discussion of the exact relation of the “ law and the Gospel ” to the natural law. The natural law is said to be contained in the “ law and the Gospel,” but not everything that is contained in the⁴⁴ “ law and the Gospel ” belongs to the natural law. There are regulations of the⁴⁴ “ law ” which are not permanent or unalterable, which are not really part of the natural law?

Gratian does not, as far as we have seen, explicitly apply this to canon law, but we think that it is quite clear that he implies such an application, and that while the canon law may contain rules which are directly representative of the divine⁴⁴ “ natural law,” yet it is not to be identified with this. There are rules of the civil law and of the canon law which are directly representative of the natural law, but the natural law is not to be identified with either the civil law or the canon law. Not, indeed, that any law, whether civil or canon, is valid which contradicts the “ natural law ” : we have pointed out that Gratian is perfectly clear that all such laws are necessarily void;¹ the civil law and the canon law must be in harmony with the natural law, but they represent not the mere assertions of it, but the applications of its principles to particular circumstances and times—applications ■ which are not necessarily permanent, and whose authority is not the same as that of the natural law itself.

If canon law, then, is not divine law in the full sense, we must ask how far it can be said to belong to the domain of custom, whether written or unwritten. We find that while Gratian does not draw out the subject completely, yet clearly he implies that at least in

part canon law represents the authority of custom. We have already referred to the two passages which he quotes, in which it is laid down that custom forms part of the law of the Church,³ and the importance which he attaches to custom is brought out clearly by the terms in which he treats the general question of the validity of law. Gratian, as we have seen, treats law by whomsoever promulgated as really invalid unless it is confirmed by the custom of those who are concerned, and he finds his illustrations of this in certain decrees of Popes Telesphorus and Gregory the Great enjoining upon the clergy the observance of the Lent fast for seven weeks before Easter. This, he says, never became law, because it was not recognised by custom. Gratian does indeed suggest, after he has laid down the theory, that possibly these decretal letters may be taken as conveying a counsel rather than a command, but he does not suggest any modification of the general principle which the case was intended to illustrate.³ It seems clear that in part canon law represents the authority of custom just as civil law does.

We can now consider the definition and classification of canon law with which Gratian furnishes us. In his formal definition of Church law he says that an ecclesiastical constitution is called a canon. He describes the collection of canons as consisting of decretals of pontiffs and statutes of councils. Some of these councils are universal and some provincial. Of these latter some have been held with the authority of the Roman See—that is, in the presence of a legate of the Roman See; others with the authority of patriarchs and primates or metropolitans of provinces. Further on he describes the purpose of the ecclesiastical as well as of the civil laws as being to ordain what men must do, and to forbid what is evil.¹

This definition seems expressly to leave out of account such canons as may be merely restatements of the rules of Holy Scriptures, or of the natural law, and to confine itself to those which represent the authority of the Church. It is important, then, to observe that Gratian here describes broadly as sources of canon law the decretals of pontiffs, the canons of universal councils, and of some provincial councils. Gratian does not here mention custom as a source of Church law, but that he does include this is evident from the passages referred to above and from a passage in another ⁴ Distinction, where he lays down the principle that custom yields to law, but finally adds that when custom does not contradict the sacred canons or human laws, then it is to be maintained.² Clearly custom is, in his view, also a source of Church law, but he conceives of it as being invalid, as against actual written canon

law;¹ we must, however, bear in mind the principle which we have already seen Gratian to hold, namely, that written law must be approved by the custom of those concerned before it can become law. Canon law thus, in Gratian's treatment, has for its sources the authority of certain persons who are looked upon as having legislative authority, the decrees of councils, and custom.

Before we consider Gratian's theory of these various sources, we must be careful to notice once again that there is a law behind the canon law which is superior to it, just as it is superior to the civil law. The Scriptures and the Natural law represent the immediate law of God, and every law or constitution, whether civil or ecclesiastical, which contradicts these is null and void.²

We have already considered the theory of Natural law in Gratian and the other canonists,³ and we need not therefore discuss over again his theory of this subject. We must, however, again bear in mind that there are certain difficulties connected with this

subject. The canonists, as we have seen, clearly understand by the natural law those general principles of moral obligations which man is supposed to recognise by his reason as binding upon him. This natural law is contained in the Scriptures, but this raises the difficulty that there are many laws in Scripture which are not now recognised as binding. Gratian explains this by the distinction between the moral and the ceremonial aspects of the Scriptures. Another difficulty lies in the fact that while the Natural law represents the immutable moral principles of the Divine law, as a matter of fact there are institutions of human society which seem, to be contrary to these principles. Gratian himself points out the opposition, but does not suggest the explanation; but this is done by commentators like Rufinus, who distinguish between the commands and the demonstrations® of the natural law, and argue that while the latter represent the ultimate principles of moral relations, the actual conditions of human life, in virtue of the force of evil in human nature, require other regulations, and that institutions like property and slavery which are on the surface contrary to the principles of the Natural law are really the means by which men are to be trained to obey it. There are thus rules of human, conduct which might seem contrary to the Scriptures and to Natural law, but this contradiction is to be explained by such considerations as those which we have mentioned; subject to such exceptions it remains true that any law, ecclesiastical or civil, is void, if it be contrary to natural law.

We can now consider the nature and the relative importance of those sources of the canon law which we have already enumerated. Gratian sets out at length in the fifteenth and sixteenth ⁴⁴ Distinctions ” the place of general councils, and cites several lists of canons of local councils and of letters and other writings which were recognised as having authority in the Church.¹ In the seventeenth Distinction he sets out the principle that such general councils can only be summoned by the authority of the Roman See,³ and cites a number of passages in support of this view. To enter into the details of the sources cited by Gratian, or to discuss the question of the historical accuracy of his judgment that universal councils could only be summoned by the Roman See, would be entirely outside the scope of this work. It is enough for us to observe that Gratian is quite clear that the canons of universal councils, or works recognised by them, form the first important element in the body of the canon law, and that he is clear that the authority of the Pope is an element in their validity.

In the eighteenth Distinction Gratian deals with the place of provincial councils or synods in the canon law, and he maintains that these have in themselves no power of making laws, but only of administering and enforcing them.¹ We may take it that he means that so far as canons of local councils, such as Gangrm or Ancyra, were admitted into the body of the canon law, it is only because they have been ratified by the judgment of some general council or of the Pope.

We pass now to the second source of canon law dealt with by Gratian—that is, the decretal letters of the Bishops of Borne. Gratian deals with this subject in the nineteenth Distinction. He formally states the question whether the decretal letters have authority when they are not found in the collections of the canon law? In the first passage he cites, the question refers ■ primarily to the pseudo-Isidorian decretals, whether, namely, these, which had not hitherto had any place in the collections of canons current in the ninth century, were to be received as having canonical authority; but the question Gratian raises is not their genuineness, but whether, if taken as genuine, they are to be received

as canons. He treats this by citing a number of passages from various Papal letters, and from the capitularies, which he takes as showing clearly that Papal letters have authority in the whole Church. He therefore concludes that the decretal letters have the same authority as the canons of councils?

Gratian's position is quite clear, but he makes one important qualification. These decretal letters have the force of canons, unless they are contrary to the "evangelical precepts" or the decrees of earlier Fathers: a letter of Pope Anastasias II., which violated the law of the Church and was issued unlawfully and uncanonically, and was contrary to the decrees of God and to the regulations of his predecessors and successors, is repudiated by the Roman Church; and Gratian adds a tradition that Anastasias was struck down by the Divine judgment.¹

In order, however, that we may form a complete estimate of Gratian's judgment on this subject, we must take account of a very important discussion of the whole question which we find in the second part of the ⁴ Decretum? The discussion arises out of the question how far the Pope has the power to confer upon the Ecclesia baptismalis of a diocese the right to all the tithes in that diocese, and how far, if the Pope has once done this, it is lawful for him to exempt certain monasteries from the obligation of paying tithes to the Ecclesia baptismalis. It is argued, in the first place, that the Popes cannot confer upon the Ecclesia baptismalis such a privilege, inasmuch as according to the ancient canons the tithes are to be divided into four parts—one for the bishop, one for the clergy, one for the repairs of church buildings, and one for the poor. This raises the whole question of the authority of the Pope to override the ancient canons by the grant of such a privilege, and this involves the question of the relation of his authority to that of the canons.

Gratian first cites a number of authorities which would seem to show that the Pope is bound to maintain the canons. Some of these are so strong that we shall do well to notice them before considering Gratian's own conclusions. One of them is a passage from a letter of Pope Urban I., in which he asserts very emphatically that the Roman pontiff has authority to make new laws, but only when the Lord, or His apostles, or the Fathers who followed them, have not laid down any rule: when they have done this, the Pope cannot make any new law, but must rather defend these laws at the risk of his life: if he were to endeavour to destroy that which they had taught, he would fall into error. Almost more emphatic is a fragment from a letter of Pope Zosimus I., which, asserts that even the authority of the Roman See can do nothing against the statutes of the Fathers.

Gratian's own conclusion is stated at length at the end of the ⁴⁴ question." He begins by enumerating the reasons that may be urged to show that the Roman See cannot grant any ■ privilegia contrary to the canons. In reply to these he urges first of all that the Pope gives validity and authority to the canons, but is not bound by them; he has the authority to make canons, as being the head of all churches, but in making canons he does not subject himself to them. He follows the example of Christ, who both made and changed the law, who taught as one who had authority, and not as the scribes, and yet fulfilled the law in His own person. So also at times the Popes subject themselves to the canons; but at other times, by their commands or definitions, show themselves to be the lords and founders of the canons. Gratian therefore interprets the passages which he has cited as imposing upon others the necessity of obedience, while the Popes may obey if they think fit. (*Pontificibus . . . inesse auctoritas observandi.*) The Roman See, therefore,

should respect what it has decreed, not through the necessity of obedience, but *auctoritate impertiendi*. It is therefore clear that the Popes may grant special *privilegia* contrary to the general law. But again, Gratian urges, it must be remembered that, strictly speaking, such *privilegia* are not really contrary to the canons, for the interpretation of the law belongs only to him who has the right of making laws, and therefore to the Roman See. In the decrees of some councils it is specially stated that these are issued subject to the proviso that the Roman Church may ordain otherwise, or with the reservation of the apostolic authority; it must therefore be understood that canonical rules with respect to tithes or other Church affairs are made subject to the authority of the Roman Church to ordain or permit otherwise. *Privilegia*, therefore, granted by the Roman See are not really contrary to canonical order.

The Roman Church, therefore, can issue special *privilegia*, but must, in doing this, remember to maintain equity; *privilegia* should not enrich one at the expense of many. The Pope should remember the saying of the apostle to the Corinthians (2 Cor. viii. 13): “We do not wish that others should be relieved, and you distressed,” and the parallel saying of the sacred law of the emperor: Rescripts obtained against law are to be rejected by all judges, unless they are of such a kind as to hurt no one; and, petition must not be made for things contrary to law and damaging to the revenue.¹

It is interesting to observe that Gratian uses with respect to the Pope the phrase of the *corpus juris civilis* with regard to the emperor, he attributes to him the power *juris condendi et interpretandi*, and that he probably has in his mind also the legal doctrine that the emperor is not subject to the laws. This does not mean that Gratian borrows these conceptions from the civil law, but that he finds in these phrases of the civil law terms convenient to express that conception of the legislative authority of the Pope, and of his relations to Church law, which he judges to be true. It would be quite incorrect to suppose that these canonists constructed their conception of the legislative authority of the Popes by imitating the civil law; that conception was, as we have seen, much earlier than the new critical study of the civil law in the twelfth century, but this systematic study assisted the canonists like Gratian to find suitable terms and phrases under which to express their conceptions.

Gratian, then, is perfectly clear that the Pope has an authority which is legislative as well as judicial. But it is important to understand what is, in Gratian's view, the nature of this legislative authority of the Church and the Pope, and how it is related to other authorities. In one passage he raises an interesting question with regard to the relation of the canons of the Church and the interpreters of Scripture. The authority of these depends upon their spiritual enlightenment, upon their knowledge and wisdom, and in this respect, as Gratian says, it may be urged that the works of such Fathers as St Augustine or St Jerome

are superior to those of some of the Popes. Does this mean that the sayings of these Fathers have an authority greater than that of the Papal decrees or judgments? Gratian replies by pointing out the distinction between knowledge and jurisdiction, and urges that in determining legal cases not only knowledge but jurisdiction is necessary, and thus while some interpreters of Scripture may equal the Popes in knowledge, they are inferior to them in authority with regard to the decision of legal cases.¹ Gratian does not, so far as we have seen, draw this out in a complete analysis of the various aspects of the

authority of the Church, but the discussion is sufficient to prove to us that Gratian does not look upon the authority of Church law as being of precisely the same nature as the authority of Church doctrine.

This does not mean that the canon law has not authority over all Christian men. On the contrary, the man who refuses to accept and to obey it is said in a passage of a letter of Pope Leo IV., quoted by Ivo in the ⁴ *Decretum* ' and ⁴ *Panormia*, ' and by Gratian, to be convicted of not holding the faith.² The canons, then, are binding upon all Christian men, but again Gratian makes an interesting observation upon their nature: they are indeed authoritative, but they exist for certain definite reasons, and when these cease to exist then the laws also cease. Gratian gives as an example the canonical rule that laymen may not be elected as bishops, while as a matter of fact various great saints, like St Ambrose and others, were chosen as bishops while they were still laymen. He concludes that the reason of the rule was that the layman, not having been trained in the ecclesiastical discipline, cannot well teach it to others: when, however, a layman was superior in the character of his life to the ecclesiastics, as was the case with St Ambrose, the rule was not binding.¹

Such, then, in its main outlines, is the theory of Gratian with regard to the canon law. Its sources are the custom of the Church, and the authoritative promulgation of rules and laws of ecclesiastical order by general councils or by the Popes. Behind these there lies the authority of the Natural law and of the Scriptures: these may be represented in the canons, but are not to be confused with the canons; they are rather the norm by which the validity of any canon may be tested. The canons of the Church belong to the same category as the civil law of the State; they do not represent an absolutely final authority, but are rather the expression of the authority residing in the Church and its proper officers for the government of the society, subject always to the authority which lies behind the society. But they are binding upon all the members of the society; to refuse to obey them is to refuse to recognise the authority of God, from whom this authority is derived.

We must now examine the commentators on Gratian and the other canonical works down to the *Decretals*, and consider how far these carry on or modify the views expressed by Gratian.

The first of these commentators is Paucapalea, whose ⁴ *Summa* ' on Gratian's⁴ *Decretum* ' seems to have been written not many years after the ⁴ *Decretum* ' itself. He begins his work with a description of the origin of law, general and ecclesiastical. This is in the main a summary of Gratian, but it is worth while considering, for it brings out very distinctly the main aspects of the subject. Ecclesiastical law, he says, is to be divided into natural, written, and customary law. Natural law is contained in the ⁴⁴ *Law and the Gospel*, " and commands men to do to each other as they would be done by. This law began with the rational creation, is supreme over all law, and is immutable. Customary law began later, when men first came together, ⁴⁴ when Cain is said to have built a city," and it was renewed after the Flood, in the time of Nimrod. Written constitutions began with the regulations which God gave to Moses with regard to the condition of the Hebrew slave. The law of the Church began with the ⁴⁴ *decreta* " of the holy fathers and the ⁴⁴ *statuta* " of councils. After the Apostles came the supreme Pontiffs and the holy fathers, who had authority to make canons, for till the time of Pope Sylvester it was impossible for councils to meet; after that time the bishops of the Church began to meet in councils

and to issue their decrees. The decrees, whether of councils or of the Holy Fathers, have the same subject matter, namely, ecclesiastical orders and causes.¹

This, summary is interesting, not because it modifies in any important point the principles of Gratian, but because it brings out clearly the mode in which he was understood. In the first place, it is noticeable that Paucapalea looks upon canonical law as having the same varieties as secular law. Canon law is not to be identified with Natural law. A part of it is so, and that part is prior to and superior to all others. In the second place, it is very noticeable that Paucapalea looks upon custom as having a place in Church law. And again, Paucapalea recognises the decrees of the Pontiffs and Fathers as having the same canonical authority as the decrees of councils, and as even preceding them in point of time.

The only other matter of importance in Paucapalea's treatment of the theory of canon law is a brief discussion of the relative value of different authorities in the Church: this occurs in connection with a difference of opinion between St Jerome and St Augustine as to the ordination of those who had been twice married, once before and once after baptism. Paucapalea solves the question by citing a sentence which he thinks comes from St Isidore, in which it is said that if there is a difference between two councils, that council should prevail which is the older, or has greater authority; and that the authority of the Pope (apostolicus) or of bishops is greater than that of a presbyter, even though the personal merit of the presbyter may be higher.¹

We turn to Rufinus and Stephen of Tournai. And first we must recall to our reader that very elaborate and careful discussion of the subject of natural law by Rufinus, with which we have already dealt. Rufinus holds that the natural law is to be identified with that moral principle which bids a man do what is right and avoid what is evil. It is this principle, of which man had in part lost his knowledge through the fall, which was again set up, incompletely, in the Ten Commandments, and perfectly in the Gospel.² It is therefore in its essence immutable, and it is supreme over all systems of law,³ and no dispensations against it can be granted, unless in some extreme case of necessity?

Canon law, according to Rufinus, arose with the growth of the Church, and the need of order and of the adjustments of disputes between ecclesiastical persons, for which the Gospel did not sufficiently provide. Regulations were made for these purposes by the apostles and their vicars and the other ministers of the Church, and these are called canons J'

Stephen of Tournai uses the phrase *jus Divinum* sometimes in the same sense as Gratian, but sometimes he also uses it to describe the whole body of Ecclesiastical law. He is aware that Gratian uses the phrase as equivalent to the *jus naturale*, and in this sense he distinguishes it from the *jus canonicum*, but in one place he speaks of property existing by the *jus Divinum* or by the *jus canonicum*,⁶⁴ which is Divine." He explains this, however, by saying that while by the *jus Divinum*, that is the *jus naturale*, there is no private property, by the *jus canonicum*, which is made ■ by men, but with the inspiration of God, there is such a thing as private property.² It seems clear that he agrees with Gratian that, in the primary sense, canon law is not the same as the *jus Divinum*, but he suggests that it may be called a part of this in some secondary sense,—it has been made with the inspiration of God. In another passage he

uses the phrase *jus Divinum* to describe the whole body of religious law, whether pre-Christian or canonical, and in discussing the origin of this system of law he says that it began with the beginning of the world, and describes Adam's charge ■ against his wife as marking the beginning of the legal process. Others, he says, have held that the organisation of judicial proceedings began with the law of Moses; but others again begin the treatment of the *jus Divinum* with the primitive Church. When persecution ceased, under Constantine, the Fathers of the Church began to meet together in councils and to enact canons for the regulation of ecclesiastical affairs.¹

This is followed by a description of the various authorities from whom canon law has proceeded, and we must now consider this aspect of the theory of Stephen and Rufinus.

Some ecclesiastical laws, Rufinus says, are the decrees of the greater councils of Nice, Constantinople, Ephesus, and Chalcedon; others, of lesser councils; others, again, are Apostolic canons, or decrees of pontiffs, or they represent the authority of the expositors of Scripture. The decrees of the four greater councils and the Apostolic canons can under no circumstances be violated, except by way of relaxation of their rigour against certain persons and against certain offences, and he cites by way of illustration the Nicene canon against the ordination of the man who has been twice married, and the Apostolic canon that a presbyter guilty of fornication must be deposed. But whilst the prohibitions of these authorities cannot generally be altered, it is different with regard to that which they permit. The Nicene council, for example, permitted priests to live with their wives, a thing now prohibited (*apud nos*). The decrees of the lesser councils, of the pontiffs, and the judgments of the expositors of Scripture can, for sufficient reason, be changed by the supreme Patriarch.¹

Stephen's treatment is similar, but rather more detailed and different in some respects. After describing the origin of ecclesiastical law in the passage we have just quoted, he goes on to distinguish between general and provincial councils: General councils are those which include bishops from all parts of the world, and are held in the presence of the Pope or his legate, while provincial councils are the meetings of the bishops of a province summoned by the primate or archbishop. The canons of general councils must be obeyed everywhere, those of provincial councils are only binding upon those who are under the jurisdiction of the bishops of the province. Among the general councils there are four which are pre-eminent, those of Nice, Ephesus, Chalcedon, and Constantinople: their authority is almost equal to that of the Gospels. The name canon belongs properly to the decree of assemblies of bishops. By "*decreta*" are meant those decrees on Church matters which the Pope gives in writing in the presence and with the authority of the cardinals. "*Decretalis epistola*" is a letter which the Pope writes to some bishop or ecclesiastical judge who is in doubt, and who has asked the advice of the Roman Church. Canons are called "*decreta*" and "*decreta*" canons. These are the ordinances by which ecclesiastical affairs must be decided. The order of the authority of these rules should be carefully considered: the first place is held by the evangelical precepts, next come the sayings of the apostles, then the before-mentioned four councils, then the other councils, then the *decreta* and *decretales Epistolae*, and last the sayings of the holy Fathers—St Ambrose, St Augustine, St Jerome, and others. In cases of difference between these, it is important to remember that they may be arranged under four heads—counsels, precepts, permissions, and prohibitions *, and even the precepts and prohibitions are not all alike,—some are perpetual, some changeable.¹

Stephen's discussion is notable specially for its definition of the nature of papal decreta and decretalia, and for its ehissification of the authority of the various canonical rules. The definition of the papal canons is interesting, and probably of some importance, but we have not found any parallel discussion of it in the works which we are now treating. As to the circumstances under which the canons may be altered, he discusses this point in much the same terms as Rufinus. That which is contained in the Gospels, in the words of the apostles and in the four general councils, and that which belongs to the articles of the faith, without which a man cannot be saved, these things cannot be altered; other canonical rules may be changed, but not these. Yet there are some possible modifications of the canons of general councils, and even of the apostolic canons. On this point there is no difference between him and Rufinus.¹

Canon law, then, if we omit for a moment the regulations which are directly taken from the Scriptures, represents the legislative authority of the Church and of the Roman See, but that legislative authority is not entirely free and unhampered. Rufinus points out that there is one very important difference between secular and ecclesiastical law—that is, that while in secular jurisprudence new laws always override the old, this is not the case in ecclesiastical law, for, on the contrary, it is frequently the case that the old laws cannot be overridden by new. The principle (ratio) of secular law is not the same as that of the divine laws.¹ He is here drawing out the principle which is contained in his classification of the canonical sources, and which is repeated by Stephen, that in some points the Church has not authority over its own legislative system.

We must for a moment consider the significance of the omission, in these classifications, of one important source of canon law, that is, the custom of the Church. We might at first sight be inclined to think that this is due to some tendency to depreciate the importance of this element, and it is, of course, possible that something of this may be the case here, but in other places Rufinus makes it clear that he follows Gratian in admitting the importance of a general custom of the Church. In the earlier part of that passage of which we have just cited the conclusion, Rufinus discusses the question of prejudicatio—that is, as I understand, the antecedent invalidity of certain legislation. His immediate subject is the question of dispensation, to which we shall presently return; and after saying that some laws can be dispensed with and others not, he says that some laws prejudicantur, either because they are opposed to some previous constitution or to some custom; and then resuming the subject a little later, Rufinus inquires what canons are particular prejudicantur, and mentions first those which clearly contradict either general custom or the constitution of some greater authority, and he mentions as an example of prejudicatio by general custom that decree of Pope Telesphorus which Gratian had said was invalid because it had never been received by the custom of the Church.²

It is clear that Rufinus had no intention of differing from the doctrine of Gratian with regard to the importance of the authority of custom as a source of canon law, but it is, of course, possible that he may have differed from him or from other canonists with regard to the actually existing force of custom. Rufinus was clear that if custom now abrogates canons, it only does so with the consent of the Pope, just as, he says, now that the Roman people have transferred their legislative authority to the emperor, their custom can only abrogate the civil law with his consent. There are also some canons of the ancient Fathers, such as those of Nice, which cannot be changed even by the Pope or by custom.¹

There is nothing in the work of Stephen of Tournai to indicate his attitude clearly. In one place, indeed, he speaks somewhat disparagingly of custom,—this is when he says that Gratian had set about his work because, through mere ignorance, the Divine law was falling into disuse, and the various churches were living rather by custom than by canon law: this, he says, was deemed by Gratian to be perilous, and therefore he set about the collection of the laws of the councils and Fathers? But it would be foolish to take' this as a serious criticism on the place of custom in the system of canon law.¹

We turn now to consider the treatment by these commentators of the legislative authority of the Pope. We have already seen in the classification of the sources of the canon law by Rufinus and Stephen, that the decreta or decretalia of the Pope have the authority of law,² and we have just quoted the passage from Rufinus in which he says that just as civil laws cannot be made or abrogated without the consent of the emperor, so also canons cannot be made or unmade without the knowledge and assent of the Pope. The authority of the Pope is therefore necessary for all legislation, and he has also the power of promulgating canons by his own authority. In other passages Rufinus says he has the authority of making and interpreting the canons,³ and explains this as being due to the primacy of the Boman Church.⁴

Stephen, as we have seen, while describing canons as being in the strict sense the decrees of general councils, adds that the Papal decreta and decretalia are also called canons,⁵ and in another passage he says that the Popes alone have authority to make canons.⁶ This might mean that the Popes are now the sole legislators, as Justinian claims that the emperor had become ;⁷ but this seems hardly consistent with Stephen's own earlier statement as to the authority of general councils held, in the presence of the Pope or his legates,¹ and it seems most probable that Stephen is only contrasting the legislative authority of the Pope with the absence of legislative authority in the writing of the Fathers.

However this may be, Stephen clearly agrees with Gratian and Rufinus that the Papal decreta and decretals have the force of canons. In one passage he uses a phrase to describe the relation of the Popes to the canon law, which he probably drew from the civil law. He speaks of him as *legibus eclesiasticis absolutus ui princeps civilibus*, but adds that he keeps the laws most carefully? This phrase of Stephen should be compared with the passage of Gratian on the relations of the Pope to the canon law, which we have considered,³ but what exactly Stephen understood it to mean it is difficult to say—as difficult as it is to interpret the phrase with regard to the emperor in the civil law. We have elsewhere suggested that probably the phrase finds its best interpretation in the parallel of the dispensing power of the crown, and it is probably in the same direction that we must look for the explanation of the phrase in relation to the Pope?

The Pope has then the authority of making and unmaking canon law, but this authority is not unrestricted. Rufinus restates the judgment of Gratian, that the Pope cannot make canons against the authority of the Gospels or the decrees of the Holy Fathers, and again cites the case of the invalid decree of Pope Anastasias? Neither custom nor the authority of the Apostolic See can abrogate the statutes of the ancient Fathers which were promulgated with full authority for the preservation of the whole Church, and are preserved by the reverence of almost the whole world—such as the canons of

Nice and other similar canons.¹ It is true that there is no passage in Stephen which is exactly parallel to this, but there is no reason to suppose that he would have differed; it is after all only the direct application to the Pope of these general principles, in which Stephen agrees with Rufinus, that certain parts of the canon law—e.g., the canons of the four first general • councils—cannot be abrogated ■ by any later authority?

We conclude that Rufinus and Stephen agree entirely with Gratian in holding that the Pope has the same legislative authority as the general councils of the Church, and that his co-operation is necessary for them; while his legislative authority has the same limitations as their authority, namely, that there are some parts of the Church law which cannot be abrogated or overridden by any new legislation.

We turn to the question of dispensation. Rufinus deals with this very carefully in one passage. He first defines dispensation as a special relaxation of canonical law, made by him who has authority to do this for some good reason. He then adds that there are some canons from which there can be no dispensation, and others which can be dispensed with. Those canons are not dispensable which are directly founded upon the moral law or the Gospel or the institution of the Apostles, and he gives as examples, the fulfilment of a vow, the prohibition to marry a second wife while the first is alive, the law that a man who is not ordained cannot ordain another or celebrate mass, the law that a man must not purchase ecclesiastical offices. No necessity of circumstance or time can ever enable a man to violate these without sin; some invincible or unavoidable ignorance may perhaps excuse him. The reason for this, Rufinus says, lies in the fact that these rules are all part of the natural law, and against this no dispensation is valid. Other canonical rules, which were promulgated and confirmed only by the authority of the holy Fathers or their successors, can be dispensed with, and he gives as examples, the rule that monks should not celebrate mass in public, or that a man who has done public penance or been twice married should not be admitted to the ranks of the clergy?

We may compare with this another passage in which Rufinus lays down the same principle that there can be no dispensation from, the natural law, admitting only one exception—that is, when a man has to choose between two evils, as, for instance, if he has sworn to kill his brother;² and in yet another passage he says no dispensation can be granted against the New Testament.¹¹ This is an important statement of principle, important in its reference to the natural law, and also in its exposition both of the extent and of the limits of the dispensing power. The importance of the subject will be recognised by any who have any acquaintance with mediaeval history.

We wish that we were able to discuss the theory of the commentators on Gratian more completely; unfortunately only a few of these are as yet accessible in a printed form. We shall not be in a position to discuss fully the development of the theory of the canon law on such a vital point as that of the legislative authority of the Pope till the mass of unprinted material has been fully examined. Especially do we regret that we cannot use the ⁴ *Summa Decreti* of Huguccio. The only portions of this important work which we have been able to use are those fragments quoted by Schulte in his work ⁴ *Die Stellung der Ooncilien,* &c. Among these we find some important phrases on the authority of Papal decretals. Huguccio discusses the regulations as to the circumstances under which a case may be taken from the inferior courts to Rome, and he concludes by saying that he trusts

the ancient decrees and the new councils rather than the decretals; and again, on the same subject, he says that appeals, even before the trial of a case, are actually heard in Rome, but he is concerned, not so much with what is actually done, as with what ought to be done.² These passages illustrate an interesting attitude towards the Decretals, but whether it is more than an isolated opinion we are not in a position to say. It is perhaps worth while to notice that in another passage, which Schulte has quoted, Huguccio suggests that in one of his Decretals Pope Alexander is speaking rather as a teacher who is giving his opinion, than as Pope.¹

One other canonist, Damasus, at a rather later date, but still earlier than the publication of the Decretals of Gregory IX., has some important remarks on the authority of modern Decretals of Popes. Of this Damasus two works have been printed, one on the civil law and one on the canon law. The latter, which is known as the ⁴ Brocarda ' or ⁶ Burchardica,' consists of a series of discussions, in which a thesis is propounded, all the relevant authorities are quoted, first, those in favour, then those against it, and finally a solutio is added. The thesis with which we are now concerned is this, that when there is a difference between various constitutions, it is not the later but the earlier—those, that is, which are nearer to the Apostolic simplicity and truth—which should prevail. Damasus cites a number of passages in favour of this view, and a smaller number against it, and then concludes that if there is a contradiction between some constitutions of recent Popes and the general canons which are approved by the authority of Holy Scripture, the latter must prevail, as being agreeable to the Divine will and the principle of equity. It must be remembered, he says, that the former Popes had the same power as the modern, and have greater authority on account of their antiquity: he is, indeed, worthy of anathema who endeavours, with whatever excuse, to destroy those things which are well ordered. He refuses to accept the authority of the comment on the canon *postea quam* (C. xv. Q. 2. 21), because these are the words of Gratian, not of the canon, and he puts aside another passage because there the opinion of Jerome, which is supported by the testimony of Scripture, is superior in authority to that of the Council.¹

This passage is interesting, but its significance must not be exaggerated: we have already seen that Gratian and the commentators whom we have been considering are careful to state that there are ancient canons which no authority can change.

When we finally turn to the theory of the Canon Law in the Decretals, we must begin by observing that in the main they assume the general principles which we here discuss; they do not go over them again, we think that they take them for granted. Two points, however, require some notice. The first is the question of the place of custom in Canon Law. We have already discussed this in a previous chapter, and we need therefore only repeat that, whatever ambiguity there may be in the position of Gratian or his commentators, the

theory of the Decretals is clear—namely, that custom, if it is ⁴⁴ *rationabilis et legitime prasseripta*, that is, if it is not contrary to ⁴⁴ *reason* and it has continued for a legally defined period of time, overrides even positive written law?

The second matter is the treatment in the Decretals of the legislative authority of the Pope. For this we must take account not only of the Decretal letters contained in the collection of Gregory IX., but also of at least one or two which appeared in earlier collections. Between the time of the publication of Gratian's ⁴ *Decretum* and the publication of Gregory IX.'s collection of Decretals, five collections or compilations of

Decretal letters had been put out—the first two and the fourth on the responsibility of private person; but the third and the fifth by the authority respectively of Pope Innocent III. and of Pope Honorius III.

The papal letters prefixed to these collections were of considerable importance in determining the character and the future development of canon law. In the first of these Innocent III. writes to the masters and scholars dwelling at Bologna, and sends them a collection of Decretal letters made and arranged by P. Beneventanus, and authorises them to use these both in the courts and in the schools? In the other, Honorius writes to Tancred, the Archdeacon of Bologna sending him a collection which he had caused to be made of judgments by himself or his representatives, and he instructs Tancred to have these formally published for use both in courts and schools?

With these we must now compare the letter prefixed, by Gregory IX. to the great collection of Papal Decretals which now forms the second part of the ⁴ *Corpus Juris Canonici*. This is addressed to the doctors and scholars of Bologna. Gregory explains that he has caused Raymond, his chaplain and penitentiary, to make this selection of the constitutions and Decretal epistles of the former Popes,—the number and variety of these had been a cause of confusion in the courts; and he has added some constitutions and Decretals of his own. He desires that this collection alone should be used in the courts and schools, and strictly forbids any one to make any further collection without the authority of the Apostolic See.¹

The importance of this letter and of the collection of the Decretals by Gregory IX. is certainly very great. The Decretals, to which were added later on the “Sixt” and the “Clementines,” became for all practical purposes the law-books of the Church: it is true that the ⁴ *Decretum* of Gratian came in some way to be treated as the first part of the ⁴ *Corpus Juris Canonici*, but the Decretals became the principal law-book of the Church, and the commentaries on the ⁶ *Decretum* now gave place to the commentaries on the Decretals. But this is not the same as to say that these letters mark a new departure in the theory of canon law. We have already seen that Gratian quite clearly places the legislative authority of the Pope alongside of that of the councils,¹ and that the commentators whom we have discussed, except Huguccio, clearly take the same view? We cannot, therefore, recognise that the letters make any change in the theory of the legislative authority of the Pope, though they may be said to represent a great development in the importance of his position as legislator.

Two phrases of the Decretals we may finally take as representing the completed Roman theory of the canon law. The first is indeed of a considerably earlier date than the publication of the Decretals by Gregory IX. It is a phrase of Pope Paschal II. on the subject of the oath of fidelity and obedience to the Pope which was required by an archbishop before he could receive the “pallium.” Paschal says that some people urged that this was not ordained by the councils. He indignantly repudiates the notion that the councils had imposed any laws upon the Roman Church, for it was the Roman Church which called together the councils and gave them authority? This is a strong statement, but it should be compared with Gratian’s elaborate discussion of the relation of the Pope to the canon law in the 25th “Causa.”⁴ The other phrase is one of Innocent III., who speaks of the Roman See as the fountain from which laws are derived?—a terse mode of expressing the conception of the legislative authority of the Roman See.

CHAPTER X

THE THEORY OF THE RELATION OF CHURCH AND STATE.

I.

WE have endeavoured to set out the theory of these canonists with regard to the divine nature of secular authority. We have endeavoured to show that they clearly follow the Gelasian traditions of the two authorities as being both derived from God, and as having been separated by Christ Himself, who alone was both King and Priest. There is a passage in Stephen of Tournai which sets this out so clearly that we shall with advantage notice its terms. In the one commonwealth and under the one king there are two peoples, two modes of life, two authorities, and a twofold organisation of jurisdiction. The commonwealth is the Church, the king is Christ, the two peoples are the two orders in the Church, that is, the clergy and the laity, the two modes of life are the spiritual and the carnal; the two authorities are the priesthood and the kingship, the twofold organisation is the divine law and the human. Give to each its due and all things will be brought into agreement.¹

Stephen's phrases are a summary of the Gelasian tradition, and, as we have endeavoured to show, this is the theory represented by the canon law as a whole. But Stephen's concluding words have a somewhat ironical sound, for a writer of the end of the twelfth century must have been well aware that it was just exactly here that the great problem of the eleventh and twelfth centuries had lain. It was easy to say that each authority should receive its due; the difficulty had been to determine what this was. As we have pointed out, the theory was simple enough. The difficulty lay in the application, or rather, within the theory itself there lurked the profound difficulty of the adjustment of the relations of the two authorities within the one society. For Gelasius had said that while each authority was independent within its own sphere, yet the persons who held such authority were subordinate each to the other within their respective spheres. It was indeed here that the difficulty had arisen. We have endeavoured to show how in the ninth century there was a general agreement as to the theory of the separation of the powers, but that as a matter of fact each authority had come to have a great deal to say in the sphere of the other.¹

It may indeed be suggested that this attempt at the separation of the authorities was impossible: there have been political theorists who have argued thus, who have maintained that it is impossible in theory as in fact to separate the spiritual and the temporal authorities. For ourselves such a judgment seems to be both unphilosophical and unhistorical. However this may be, the difficulty of delimitation proved to be enormous.

We cannot write the history of the great controversy of these centuries: this has, indeed, been often done, though, as it seems to us, a complete treatment of the subject has not yet been produced, and will not be possible until the whole civilisation of these times has been more completely examined. When we come to deal with the controversial literature of the eleventh and twelfth centuries we shall have occasion to point out some of the more important aspects of this history. In the meanwhile it must suffice to say that while in the ninth century each authority interposed in the sphere of the other, with comparatively little friction, by the eleventh century all this was changed, and we find each authority repudiating with

vehemence the claims of the other to interfere in its concerns, while each endeavoured to vindicate and sometimes to extend such authority as it had actually been exercising.

We deal in this chapter with the relation of the Canon law to the supposed tendency of the Church to claim, not only superiority, but in some degree at least supremacy, over the State. The question of the development of this tendency in the Canon law may be conveniently considered under four heads—first, the tradition of cases in which the Papacy had actually or apparently exercised some such supremacy; secondly, the development of the theory of the consequences of excommunication; thirdly, the theory that Peter, and therefore his successors, had received from Christ authority over the temporal as well as the spiritual power; and, fourthly, the interpretation of the Donation of Constantine. When we have examined these we shall be in a position to examine the more or less formal statements of the Decretals upon the subject.

In our first volume¹ we have pointed out that the great Churchmen, and pre-eminently the Pope, had sometimes, as a matter of fact, and were supposed to have frequently exercised a very great and at times a commanding influence upon the appointment and deposition of kings and emperors. The fact is not to be disputed that they had sometimes exercised such a power, and, as we have pointed out, the secular authorities in the ninth century sometimes at least quite frankly recognised this.

These traditions are well known to the canon lawyers: in a passage of that famous letter of Gregory VII. to Hermann, the Bishop of Metz, which is cited by Ivo in the ‘Decretum’⁵ and by Gratian, it is related how the Popes deposed the last of the Merovingian race, and put Pippin in their place, absolving the Franks from their oath of allegiance to the former king.²

Cardinal Deusdedit in his collection of Canons cites the words of the Synod of Rome of 877, in which Pope John VIII., with the other bishops, the Senate, and the whole Roman people, elected Charles the Bald as emperor,¹ and he cites from Anastasius⁴ Bibliothecarius ‘the tradition that it was Pope Gregory who led the revolt of Italy against the iconoclastic emperors, and renounced allegiance to them?’

When, therefore, Innocent III. in his Decretals maintains that it was the Popes who had transferred the empire from the Greeks to the Germans, he was only repeating a tradition which was in accordance with many others, and which had some reasonable colour of justification?

The canonists then represent clearly the tradition that the Pope had actually exercised a large authority over the appointment and deposition of emperors and kings: we need not discuss how far this tradition was historically justifiable—in part undoubtedly it represented actual events; we are here only concerned with the fact that the tradition existed, and represents one element in the canonical theory of the relation of the Church and the Papacy to the secular power.

We find the second element in the canonical theory, in the development of the theory of the results of excommunication. With this is closely connected the question of the authority of the Church in absolving a man from an illegitimate oath. It is well to notice at the outset that Stephen of Tournai mentions that there are some who maintain that properly speaking the Pope does not absolve a man from his oath, but simply declares that he is absolved,¹ the oath, that is, being of itself null and void. It is not clear whether Stephen takes this view himself, but it may fairly be said that the principle lies behind the attitude of the Church in the Middle Ages to this question. The earlier canonists put

the matter simply, that evil oaths should not be kept,—that it is better to commit perjury than to keep a wicked oath?

The principle is reasonable, and it was natural under the terms of the mediaeval conception of society that it should have been held that the Church should determine which oaths were as a matter of fact proper to be kept. The ultimate consequence of this theory and its practical outcome in the attitude of the later Middle Ages to obligations deliberately undertaken we do not here discuss. The principle is clear that the Church was held to have the power to declare when an oath was null and void.

This principle assumed a great political significance when it was brought into connection with the theory of the consequences of excommunication. The history of this is a large subject, which we cannot stop to consider at length. It is enough to notice that in the earliest of the canonists whom we are considering—that is, Regino of Pruin in the ninth century—the consequences of excommunication are already very emphatically drawn out, though with reference directly to monastic institutions only. No one is to pray, to speak, or to eat with an excommunicate person; those who do so incur the same sentence.¹ Regino and Burchard of Worms cite formulas of excommunication which again serve to bring out very clearly the nature of the sentence and its effects upon the actual as well as future condition of the excommunicate¹ person, and especially the principle that he was in such a sense cut off from all the ordinary relations of life, that no one could live with him in those relations without incurring the same condemnation.² We need not multiply citations to bring out the fact that this was the theory of the mediaeval Church.

We have in our first volume pointed out that, in spite of certain ambiguous phrases, there can be no doubt that the Church clearly maintained that the king or emperor was in his own person subject to the ecclesiastical jurisdiction of the Church like any other person, and therefore, in extreme cases, to excommunication.¹ Ivo in his 'Panormia' cites part of a letter in which Gregory VII. vindicates the right of the Church to excommunicate even the supreme temporal ruler, and cites various real or traditional examples of this : there can be no doubt that Gregory's conclusion was historically justified.² There was here nothing new or revolutionary.

The emperor or king was then, in the theory of Church law, liable to excommunication for just cause, like any other person, and like every other excommunicate person was to be avoided and shunned. But this fact would easily bring with it consequences of a still larger kind: the excommunication of a king or emperor would make any relations between himself and his officials, and even his people in general, almost impossible. It was only natural that in the end men would ask whether the oath of allegiance to such a ruler could really be binding.

It is from the standpoint of this theory that we have to examine the claim of the Church and Pope to absolve a man from the obligation of an oath taken to the king or emperor. Gregory VII. absolved the subjects of Henry IV. from their oath of allegiance to him, and Ivo in the 'Panormia' quotes from the decrees of Gregory's council held in Rome A.D. 1078, the words in which the general principle is laid down.¹ Again, Ivo in the 'Panormia' cites a phrase of Pope Urban II., in which the principle is still more generally stated that oaths of fidelity made to one who was afterwards excommunicated are of no obligation.² These passages are again cited by Gratian in the '

Decretum.³ Gratian himself draws out the conclusion from these principles in general terms when he says that the Pope absolves men from their oath of fidelity when he deposes the rulers?

It is important to notice the comment of Rufinus. He urges that it is necessary to observe that an oath may be of two kinds: it may be made to the ruler as a man, or it may be made to him as holding a certain office. In the first case, the oath is always binding on him who has taken it, unless the ruler is excommunicated, in which case he must not keep his oath of fidelity. In the second case, if the ruler is legally and canonically deprived of his office, then the oath is of no further obligation?

It is clearly, then, a principle of the canon law of these centuries that a ruler can be excommunicated, and that this carries with it the consequence that his subjects can be, or rather are, ipso facto, released from their oath of allegiance to him.

We turn to the third aspect of the canonical theory, the conception that Peter, and therefore his successors, had received from Christ authority over the temporal as well as the spiritual kingdom.

This appears first in the Canon law in Gratian's ⁴ Decretum.' In the twenty-second Distinction he collects the passages which show that the Roman Church had authority superior to that of all other Churches. He begins by citing a part of what he considers to be a letter of Pope Nicholas II. to the Milanese (this is really a letter of Peter Damian to Hildebrand, preserved in the Acts of the Convention of Milan of A.D. 1059-60). In this letter it is laid down that it was the Roman Church which had created patriarchal and metropolitan dignities and the sees of bishops, and which had determined the rank of all the Churches, while the Roman Church was founded by Christ Himself, who committed to Peter the laws both of the earthly and heavenly empire.¹ It does not appear how Gratian understood these last words, or what importance he attached to them, for he makes no comment upon the passage: it must be noticed that the words occur incidentally in a passage which otherwise is concerned with the relation of the Roman Church to other churches.

This passage is commented on by Rufinus and by Stephen of Tournai. Rufinus deals with it in a somewhat elaborate fashion. He interprets the phrase *terreni simul et celestis imperii jura* as meaning that he has authority both over the clergy and over secular persons and things: the vicar of Peter thus has the *jura* of the earthly kingdom. But, he says, we must distinguish between the *jus auctoritatis* and the *jus amministrationis*: the *jus auctoritatis* is that which a bishop exercises over all ecclesiastical matters; the *jus amministrationis* is that which the "yeonomus" (administrator of the temporalities of the diocese) exercises—he has the authority to administer affairs, but only issues commands to others by the authority of the bishop. The Pope has "*quoad auctoritatem, jus . . . terreni imperii*," for it is he who by consecration confirms the emperor in his earthly kingdom, and admonishes the emperor and other secular persons if they misuse their secular office, and absolves them when they repent. The prince has the authority after the Pope (*post ipsum*) of rule over secular persons, and *prefer ipsum* has the duty of administration: for the Pope should not deal with secular matters, nor the prince with ecclesiastical matters, in accordance with the canon "*cum ad verum ventum est*" (Gelasius's statement of the division of the two powers cited in Bist. xcvi. c. 6). Rufinus adds that others understood the canon to refer to

the fact that Christ gave Peter authority that what he should bind or loose on earth should be bound or loosed in heaven.¹

It would seem that Rufinus is anxious to preserve the principle that the Pope has the supreme authority over secular matters, but also to suggest that this authority is limited to confirming the election of the emperor, and to correcting the emperor and other secular rulers if they misuse their authority. He is anxious to bring the phrase into agreement with the principle which had been laid down by Gelasius, and which was still regarded as authoritative. The fact that he cites another interpretation, even though it is not his own, seems to show that he felt the phrase to be a difficult one.

Stephen of Tournai also suggests two interpretations—the first, that the Pope has authority both over laymen who govern worldly affairs and over the clergy who have the charge of heavenly matters, for the successors of Peter consecrate priests and crown the emperor; the second, that the Pope has such authority that what he binds and looses upon earth is bound and loosed in heaven.¹

The ⁴ *Glossa Ordinaria*, commenting on the passage, says that the Pope has both swords, the spiritual and the temporal.²

What conclusion then are we to draw? It is impossible to say certainly in what sense Peter Damian used the phrase, or in what sense Gratian understood it. Rufinus clearly thought that it meant that in some sense the Pope, as the successor of Peter, had authority over secular affairs as well as over secular persons; but being aware of the emphatic terms of the Gelasian statement, he wishes to reduce the practical meaning of the phrase as far as possible, and he therefore suggests that it is best understood as explaining the authority by which the Popes consecrate and confirm the emperors, and their right of interfering if these misuse their power. Stephen is probably condensing the statement of Rufinus, and very probably would have assented to his interpretation, though of this we cannot be certain. Both Rufinus and Stephen are aware that the phrase may be taken in another and a more general sense, and intimate that other writers had taken it so. The ‘Gloss’ interprets it as referring to the power of the two swords. We have found no reference to the phrase in the other canonists with whom we deal or in the *Decretals*.

We turn to the fourth point we have mentioned, and we must now consider the place of the Donation of Constantine in the Canon law. In our first volume we pointed out that, whatever ambiguities there may be as to the original purpose of the Donation, one thing is very clear, and that is, that no writer in the ninth century suggests that it means that the Pope has temporal authority over the Empire in the West? We cannot here discuss the history of the Donation in mediaeval literature in general; we shall recur to this in a later volume. But we must consider its place in the canonical literature. Regino of Prüm does not cite it. In Burchard there is a passage which contains the statement that Constantine left Rome, which had been the seat of the imperial authority, and granted it to St Peter and his successors? The passage belongs to the literature connected with the Donation, but does not contain the important phrases. Ivo of Chartres cites the same passage in the ‘*Decretum*,’³ but he also cites the Donation itself, including the words in which Constantine is said to have transferred to Pope Sylvester not only Rome, but all the provinces of Italy and the West/ and both passages recur in the ‘*Panormia*’⁵ and in the collection of Cardinal Deusdedit? As these canonists make no comment on the passages which they cite, it is impossible to say

in what sense they understood it. When we come to Gratian, it is certainly interesting to find that he omits it altogether from his collection. It stands, indeed, in all the editions of Gratian, but it is contained in two *Paleae*—that is, two of those canons which were inserted by a later hand. It is, indeed, impossible to say precisely what importance we are to attach to this omission, but it is certainly remarkable, for the Donation is contained not only, as we have just seen, in Ivo and Deusdedit, but also in the collections known as ‘Anselmus,’ iv. 32, and ‘Ceesareoaugustana,’ ii. 72, and all of these collections were used by Gratian. Of the two *Paleae* which have been inserted in Gratian, the first sums up the general purport of the Donation, saying that the Emperor Constantine granted the crown and all the royal dignity in the city of Rome, in Italy, and in the Western parts, to the Pope? while the second gives a large part of the text of the Donation itself, including the most significant phrases?

Gratian's first commentator, Paucapalea, who has been thought to be the author of the ‘*Paleae*,’ is the first canonist whose treatment of the Donation is explicit. Commenting on the twenty-second Distinction, he explains that Byzantium is called New Rome because Constantine transferred thither the Roman imperium, for Constantine, on the fourth day after his baptism, gave to the Pontiff of the Roman Church a privilegium, by which he handed over to him the crown and all the royal dignity and the “palace” of the Lateran, and all his glory; and further, he handed over his kingdom, declaring that he had thought it meet to transfer the seat of government (imperium) to the East, and to build in the province of Byzantium a city called by his own name, in which to place his imperium, inasmuch as it was not just that where God had placed the principatus of the priests and the

Christian religion, there the earthly emperor should hold his seat and power.¹

Paucapalea's own interpretation of this is completely set out later in his work. In commenting on the ninety-seventh Distinction, he says that while it has above been shown that the emperor is not to usurp the rights of the pontiff, nor the pontiff those of the king, yet, when the emperor has transferred all his power to the supreme pontiff he has renounced his rights and dignities. Constantine did this when, on the fourth day after his baptism, he handed over to the Pope his crown and all his royal dignity in the West. Besides this, he made many gifts, including the palace of the Lateran, and granted to the Pope the right to make consuls and patricians of the Roman clergy. Finally, he surrendered his whole kingdom and power when he said that he had thought it meet to transfer his imperium to the East, inasmuch as it was not just that the emperor should have his seat and power where God had established the principatus of the priests and the Christian religion.² Here we have a distinct exposition of the meaning which Paucapalea attached to the Donation. This is especially emphatic, because Paucapalea refers expressly to the Gelasian principle of the division of the two authorities, and, as expressly, argues

that the Donation, presumably because it was a voluntary surrender by Constantine of his authority in the West, is not inconsistent with this. Paucapalea understands the Donation as conveying to the Popes all the imperial authority, not only in Italy, but in the whole of the West.

The position of Paucapalea is clear, but it does not appear that any of the canonists with whom we are dealing followed him. Rufinus, commenting on the twenty-second Distinction, shows that he is acquainted with some part at least of the Donation, for he

explains the title of New Rome as having been applied to Constantinople, owing to the fact that Constantine transferred to it the Roman imperium, and he quotes the words of the Donation, ⁴⁴ *Congruum esse . . . habeat potestatem*,”¹ but he makes no comment on this, or on the “Palea” in Distinction xcvi.—if indeed he found them there. Stephen of Tournai makes no reference at all to the Donation or the Palea. Damasus was acquainted with the Donation, but expressly repudiates the notion that it could have the effect of permanently transferring the imperial authority in the West to the Popes. Some people, he says, maintain that the emperor holds the sword from the Pope, because Constantine left the imperium to the Roman Church, but it is more true to say that he holds it from God, as St Augustine says (referring to Dist. viii. 1), and it does not appear either that the Pope received the imperium or that Constantine could have bound his successors? There is no reference to the Donation either in the Compilations or in the Decretals, so far as we have seen.

Paucapalea is therefore the only canonist of those with whom we are dealing of whom we can say that they both knew the Donation and interpreted it as conveying the imperial authority in the West to the Pope. As we have seen, it was known and included in the collections of the canonists before Gratian, but we have no knowledge as to the sense in which it was understood by them. Why Gratian should have omitted it from the ‘Decretum’ we cannot say. Rufinus and Stephen may not have found it in their copies of the ‘Decretum,’ for we cannot be sure whether the Palea were included in them. Damasus knew the Donation but repudiated its authority. We cannot say why there should be no reference to it in the Decretals.

It is possible that there was some doubt in the minds of the canonists as to the genuineness of the Donation. We shall return to this question when we deal with the Donation in connection with the general literature of these times. Its genuineness had been doubted as early as the beginning of the eleventh century, as we know from a constitution of the Emperor Otto III., if we may assume the authenticity of the document, which is generally admitted.¹

At any rate, whatever may be the reason, we cannot say that the canon law and the canonists, with the exception of Paucapalea, till after the time of the Decretals of Gregory IX., used the Donation for the purpose of establishing the superiority or supremacy of the Pope over the secular authority.

We have then under these four heads examined the question how far the canon law claimed supremacy for the spiritual over the temporal power: first, the tradition of cases in which the Popes had actually appointed or deposed kings; second, the development of the theory of excommunication to the point that it implied that the Church had the authority of deposing kings and emperors; third, that isolated phrase in Gratian, which might mean that Peter received from our Lord Himself power both spiritual and temporal; and fourth, the interpretation of the Donation of Constantine. It is clear that while the canonists claim for the Pope authority to exercise discipline over all temporal rulers, to the extent even of deposing them, they are not clear or unanimous with regard to the theory that the Pope as the successor of Peter holds a supreme authority over both powers.

It is now possible to examine those phrases of the Popes which were considered by Gregory IX. and his advisers worthy of a place in the authoritative collection of the Decretals. It is indeed of real importance to consider these statements, which were

formally adjudged to be deserving of a place in the system of the canon law, apart from the phrases which various Popes may have used at other times. It is extremely important to distinguish between phrases recognised as representing the carefully considered judgment of the authorities of the Church, from phrases which may have been used in the heat of controversy, which may have represented the actual feeling of the moment but were not finally considered adequately representative of the judgment of the Church.

The statements which we have now to examine are with one exception contained in Decretal letters of Pope Innocent III.; and we will do well to remember that there were few of the great Popes of the Middle Ages who set the ecclesiastical power higher, and who actually exercised a greater influence in Europe.

We begin by examining a letter which he addressed to the Emperor Alexius of Constantinople, on the relations and the relative dignity of the temporal and spiritual authorities. Alexius had apparently complained that Innocent had written of him in severe terms, and apparently had appealed to St Peter's phrase, ⁴⁴ "Be subject to every ordinance of man for the Lord's sake" (1 Pet. ii. 13), as indicating that the empire was superior in authority and dignity to the priesthood, and that the emperor had criminal jurisdiction over priests as well as over the laity. Innocent energetically repudiates these contentions, and specially urges that though the emperor is supreme in temporal matters, this only affects those who hold temporalities from him: the Pope is superior in spiritual things, which are superior to the temporal even as the soul is to the body. As to the claim to criminal jurisdiction over the clergy as well as the laity, this is not just, for this jurisdiction is limited to those who use the sword.

He cites various passages of Scripture to show that the priest is superior to the king, and finally compares the authority of the Church to the sun and that of the king to the moon. God has set in the firmament of the heaven, that is, in the universal church, two great lights, that is, two great dignities, the pontifical and the royal authorities. 'But as the sun which presides over the day is greater than the moon which presides over the night, so is the Pontiff greater than the king.'¹

This passage brings out clearly some important points with regard to the conception of the relative position of the two powers. Innocent sharply repudiates the notion that the secular authority is superior to the Pope: he acknowledges that the Emperor is supreme in temporal matters, but the Pope is supreme in spiritual things, which are far greater, and—a point of great importance—Innocent clearly holds that the clergy are only subject to the secular power so far as they hold temporalities from that power, and only in relation to these temporalities, and they are, therefore, not subject to him in criminal matters. But, finally, in spite of the fact that Innocent holds that the spiritual power is immensely superior in dignity to the secular, he restates the Gelasian theory, that both powers, the secular as well as the spiritual, have been established by God, and he expresses this in the terms current in the ninth century, that these two powers are within the Church. It is noticeable, therefore, that Innocent avoids here all suggestion that the spiritual power is supreme over the secular within the sphere of the latter.

We find that this position of Innocent is maintained consistently in other important Decretals which deal with the matter. There is a very remarkable illustration of this in a Decretal dealing with the dispute as to the election of Philip of Suabia and Otto to the

empire. Innocent III. had interfered in this case to annul the election of Philip and to confirm the election of Otto. At first sight it would seem as though this were obviously an assertion by the Pope of his authority over the secular power, and of a claim to take the appointment into his own hands and to supersede the electors. But Innocent is at great pains to disclaim this construction of his action. Some of the princes had complained that the Papal legate had taken upon himself the office of an elector or ⁴⁶ "cognitor," and maintained that this was wholly illegitimate. Innocent denies that he had done this, and says that his legate had only acted, as a ⁴⁴ "denunciator"—that is, he had declared Philip to be unworthy and Otto to be worthy to receive the empire. Innocent recognises that the electors have the right and authority to elect the king, who is afterwards to be promoted to the empire; they have the right by law and ancient custom, and the Pope must specially recognise this, as it was the Apostolic See which transferred the empire from the Greeks to the Germans. But, on the other hand, Innocent urges that the princes must recognise that the right and authority of examining the person elected belongs to the Pope, who is to anoint and consecrate and crown him, for it is a general principle that the examination of a person belongs to him who is to lay hands on him, and the princes cannot maintain that if they elected, even unanimously, a sacrilegious or excommunicated person, the Pope would be obliged to consecrate and crown him. Finally, he claims that if the electors are divided, he has the right to decide in favour of one of the parties, and urges that this was done in the case of the disputed election of Lothair and Conrad.¹

It is interesting to observe how carefully Innocent guards his own action, and disclaims the intention of overriding the ■ legitimate rights of the electors. His claim, in fact, no doubt amounts to an enormous invasion of the rights of the electors of the empire—that is, his claim to determine which of the candidates should be acknowledged in case of a disputed election; but, as we have pointed out, there were important precedents for his claiming a great and even a paramount share in determining the election? His refusal to acknowledge an excommunicated person was only a natural extension of the principle that excommunication involved deposition. It is very significant that he makes no claim to any abstract political supremacy over the empire; his silence is indeed very significant, for, as we have seen, there was at least one phrase in the canonical collection of Gratian¹ which seemed to imply that the successors of Peter had received this authority from Christ Himself?

This conclusion is confirmed ¹ by the terms of another important Decretal letter of Innocent, written to the French bishops, defending his claim to arbitrate between the French and English kings. He begins by repudiating the notion that he desires to disturb or diminish the jurisdiction or authority of the French king, while he expects that the French king, on his part, will not interfere with the Papal jurisdiction and authority. The Lord in the Gospels had bidden an injured person appeal to the Church, and the king of England asserted that the king of the French had transgressed against him, and that he therefore had appealed to the Church, and the Pope, therefore, could not refuse to hear him. He disclaims all desire to judge as to the question of the fief, and he recognises that any question of this kind belongs to the feudal lord—that is, in this case, to the king of the French, unless, indeed, the *jus commune* had been altered by a special privilege or by custom; but he claims the right to decide as to the "sin," for it cannot be doubted that jurisdiction on this point belongs to the Pope. The French king should not consider it

derogatory to his dignity to submit in this matter to the Apostolic judgment; and he appeals to the words of the Emperor Valentinian and to a decree of the Emperor Theodosius, which, as he says, had been renewed by the Emperor Charles, under which any party to a suit might, even without the consent of the other party, appeal to the bishop. No sane

person, he continues, can doubt that it is the duty of the Pope to rebuke men for mortal sin, and if they refuse to submit, to subject them to ecclesiastical censure: it cannot be pretended that kings are exempt from this jurisdiction. If this is true of all sins, how much more must it be true with regard to a transgression against peace, and he appeals to the warning of the Gospel directed against those who refuse to receive the messenger of peace. Further, he reminds him that the king of the French had used the help of the Pope against Richard of England. Finally, he urges that a treaty had been made between the kings and confirmed by their oaths, and that this had been violated, and that no one could doubt that the question of the violation of an oath belonged to the Church. He has therefore, he says, appointed his legates to enquire into the matter, and if they found the complaint of the King of England to be a just one, to take such steps as he had authorised, and he admonishes the bishops to receive and carry out the judgment.¹

The claim which Innocent makes is no doubt one of great magnitude, but it is very necessary that we should observe carefully the grounds upon which Innocent rests it, and notice again the omission of all claim to act as one who possessed a political authority superior to that of the temporal sovereign. His claim is based on two principles— first, the religious one, that any question of transgression or sin by one man against another belonged to the Church's jurisdiction, and therefore especially any transgression against peace, and any question concerning the obligation or violation of oaths ; secondly, on the appeal to a legal ordinance, which permitted any party in a civil suit at any time to take the case from the civil court to that of the bishop. Innocent says that this law had been made by Theodosius and renewed by Charles the Great: the latter statement is incorrect, being based upon the spurious collection of Capitularies of Benedictus Levita (ii. 366) ; but it seems that the original source of the constitution is a genuine law of Constantine. It is contained in the constitutions of Sirmond, and Hand and Maassen have argued that this one is genuine, though they think that it was repealed by Arcadius and Honoring (Cod., i. 4. 7), and by a Novel of Valentinian (iii. 34. D).¹

Whatever may be said as to the grounds upon which Innocent bases his claims, it is quite clear that we have here no pretension to a general political supremacy. It is perhaps worth while to put beside this a Decretal of Alexander III., and another of Innocent III., which, in regard to smaller matters, seem to illustrate the same principle. In the first of these Alexander III. deals with a case in which certain knights had been summoned before the Bishop of Trier about some matters concerning the fiefs which they held from a secular lord. Their lord forbade them to answer about the secular fiefs in the bishop's court, and the bishop excommunicated them. Alexander III. annulled the excommunication, and ordered the case to be determined by the feudal lord: only in case he should act unjustly does he order the matter to go to the ecclesiastical court? In the second, Innocent III. orders the Bishop of Vercelli to declare null and void any letter which may be produced from the Holy See dealing with matters which belong to the secular courts of Vercelli. Only if the consuls and commune of Vercelli refuse to do justice to those who appeal to their court, then suitors may have recourse to the court of

the bishop or the Pope, and this is permitted, especially because at that time the empire was vacant, and there was no secular superior to whom they might appeal for justice? It is worth while to notice how in both these cases the Popes, while maintaining the principle that the Church was bound to protect those who were oppressed or unjustly treated, yet emphatically set aside any attempt on the part of Church authorities to supersede the ordinary process of secular justice.

In two Summas described by Schulte, the Pope is called “veins imperator,” and in one of them it is said that the emperor is his vicar? It is clear that this judgment does not correspond with that of the Decretals.

CHAPTER XL

THE THEORY OF THE RELATION OF CHURCH AND STATE.

n.

IN the passage quoted at the beginning of the last chapter, Stephen of Tournai speaks of the two peoples, the clergy and the laity, who dwell within the one state or commonwealth of the Church.¹ To the careless reader this might seem to imply that the secular authority is subject to the ecclesiastical. This would be a complete misunderstanding of his meaning; the Church, in the sense in which he uses it here, is not to be confused with the ecclesiastical organisation of which the Pope is the head. For Stephen is careful to say that the head of the Church, in the sense in which he is here using the word, is Christ, while the priesthood and the kingship are the heads of the two authorities which are within the Church. Stephen is putting into his own phrase the principle of the Gelasian theory of Church and State.

We have in the last chapter discussed the question how far this conception had been abandoned by the canonists in the eleventh and twelfth centuries, and its place taken by the theory that the Pope was supreme in secular things over the secular as well as over the ecclesiastical authority; and our examination has led to the conclusion that, whatever view may have been maintained in the heat of controversy, the Canon law of the period we are considering does not admit this principle, and the great Popes, so far as their judgment is embodied in the Canon law, repudiate this conception.

This does not mean that the authority of the Church is not of greater dignity than that of the State. Gelasius had confined himself to pointing out that the responsibility of the priest was greater than that of the king;¹ while Hincmar of Rheims added that the dignity of the bishop is greater, for he consecrates the king.² The Canon law holds to the conception of the greater dignity of the spiritual power; its general principle is well expressed in a phrase quoted by Ivo and Gratian as from Gregory Nazianzen, which lays stress upon the superior dignity of that authority which deals with the soul over that which only deals with the body.³ In the last chapter we have quoted that phrase of Innocent III. in which he compares the spiritual power to the sun and the temporal to the moon? These phrases illustrate the growing sense of the superior dignity of the ecclesiastical authority, but they do not mean that the Church claims authority over the State.

The whole matter would indeed have been simple and easy if the spiritual society could be separated from the secular,—> indeed Stephen's rather easy phrases would have been adequate if we could imagine this to be possible; in fact, of course this was impossible, for in fact the two jurisdictions ran across each other, or, to put it more correctly, the layman and the cleric were each subject not only to the one authority, but in

some measure at least to both, and the two systems of law sometimes at least deal with the same subjects. The difficulties of the relations of Church and State in the Middle Ages arose in large measure from the very nature of things, while in a large measure also they were the results of historical conditions whose character we have considered in relation to the ninth century in the first volume, and which we shall have to consider in relation to the tenth, eleventh, and twelfth centuries

in a future volume. We cannot now anticipate this discussion, but we must bear in mind the fact that the eleventh and twelfth centuries were full of the clamour of the great controversy between the Empire and the Papacy, between the Kings and the Bishops, and that the real difficulty in the adjustment of this controversy lay, not so much in the fact that each side put forward unreasonable ■ claims, as indeed they sometimes did, but much rather in the fact that the two jurisdictions did really cross each other, and that in the conditions of the society of that time it was very difficult indeed to find a satisfactory adjustment of claims 'which in themselves, or at any rate as related to the conditions and circumstances of those times, were reasonable. For that matter, the difficulty has not disappeared even in our time.

We have in the last chapter dealt with the supposed claim that the Pope was supreme over the State both in spiritual and temporal matters. We must now consider the more general relations of the authorities of Church and State.

We begin by considering the theory of these canonists with regard to the relations of Canon law and secular law. We have already discussed their conception of the Canon law itself, and it will be evident from this that whatever may have been the theory or practice of the ninth century, the Canon law recognises no authority of the secular power over Church law. The civil ruler has no authority over Canon law, but rather he cannot abrogate Canon law;¹ he has no authority to make laws in regard to ecclesiastical matters,²

—such regulations, even, though well-intentioned and designed for the good of the Church. are void, and must be repudiated? There is no doubt about the theory of the canonists: the Church has its own legislative authority, and its own system of legislation, which is wholly independent of the secular authority and of secular law. This principle is, so far, nothing more than the application of the Gelasian theory of the two authorities with their two spheres.

But now we come to a more difficult question, and that is, How far is the secular law subordinate to the law of the Church ? The consideration of this question requires much care if we are to keep clear of mistakes into which even some very competent historians have fallen. One thing is perfectly clear in the theory of the canonists, and that is, that the secular law is inferior and subordinate to the law of God, and that no secular authority can lawfully make laws which are contrary to the law of God. This is very positively expressed in a phrase of the Pseudo-Isidorian decretals which is cited by Burchard of Mainz, by Ivo, and by Gratian,² and more tersely in another phrase quoted by the same canonists.³ This principle is one about which there was no substantial difference in mediaeval society. But the principle must not be misunderstood,—the law of God is not the same as the Canon law of the Church. We have discussed this subject in a previous chapter, and now only recall the necessity of careful distinction between the Divine law in the strict sense of the term, and the positive Canon

law of the Church.¹ In considering the relation of the Canon law to the secular law, we must not confuse the authority of the Canon law with that of the law of God.

Canon law is binding upon all members of the Church, whether laity or clergy: those who do not obey it are to be held as though they repudiated the faith. This is very forcibly put in a passage from a letter of Leo IV. which is cited by Ivo and by Gratian? There is no doubt about the principle that the layman as a member of the Church must obey the Canon law, with regard to all those matters which belong to the sphere of the Canon law. And more than this, there are strong phrases in the canonists which lay clown the principle that all constitutions (t.e., secular ones) contrary to the Canons and to the decrees of Rome are void?

But,—and here we must be very careful,—this does • not mean that the Canon law has any place or authority in secular matters: there is, indeed, no suggestion in any of these writers of any. such notion. An examination of the context of the passage just quoted from Gratian will show that he is here only considering the question of the relation of the secular law to ecclesiastical affairs. It has been suggested that Gratian implies in these passages that if there is a conflict between the two systems of law, the secular must necessarily give way.¹ There is no reason to think that the question in this general sense is present to Gratian's mind at all in these passages. It will be useful to compare with these phrases of Gratian the comment which Rufinus makes upon this ⁴⁴ "Distinction." He observes that the statement, that secular laws which contradict ecclesiastical law are to be set aside, requires some analysis. There are two kinds of ecclesiastical law: the one is ⁴⁴ *merum*—"that is, it is founded upon the divine ordinance, or that of the holy fathers,—such is the law of tithes; the other is ⁴⁴ *adjunctum vel mixtum*—"that is, it really depends upon human law,—such is the law of prescription and other similar matters. Ecclesiastical laws, which are ⁴⁴ *mera*," cannot be annulled by the laws of the emperor; but of those ecclesiastical laws which depend upon the imperial legislation there are some which can be thus annulled.²

It is plain that Rufinus recognises the fact that the two systems of law have each their own province, but that the ■two provinces are not wholly separate,—that there are at least some cases in which the Church regulations are related to secular laws, and that at least in some of these cases it lies with the secular authority to continue or to abrogate certain rules. Rufinus does not discuss the question who is to decide in cases of a conflict between the two systems of law. On the whole, it does not appear that these canonists present any definite theory upon this subject: their general principle is clear, that each system of law is supreme within its own sphere.

Among the earlier writers the one who seems to come nearest to asserting the authority of the canons over the laws is the author of 'Petri Exceptiones.' We have quoted an important passage from him in the first part of this volume, and it is worth noticing that he speaks not merely of the legal authority of the canons of the first councils, but also holds that a new canon may abrogate an earlier law.¹

There is also one passage in the Decretals which seems to assert the claim that where there is any doubt to which jurisdiction a particular question belongs, the matter should be referred to the Pope. This passage occurs in a decretal of Innocent III.: he had been asked by the Count of Montpelier to legitimatise his illegitimate children, and, while refusing to do this, sets out the grounds upon which he considered that the Papal See was competent to deal with the question. The treatment is complicated, but, as it seems,

Innocent claims that the Roman See has always, and in all places, power to legitimatise as far as the qualifications for spiritual offices are concerned, but does not normally claim authority to legitimatise for secular purposes, such as inheritance, except in those territories which are subject to the temporal authority of the Pope. Where, however, there is no secular authority to which recourse can be had, as in the case of the King of France, who recognises no superior in temporal things, the Pope could deal with the matter if the King chose to submit it to him, though the King in the judgment of some had no need to do this, but could have dealt with the matter himself. The King of France had applied to him in such a case, and he had complied with his request. So far Innocent seems to make no very advanced claim. But he then goes on to say that not only in the patrimony of the Church,—that is, in the Papal States—but also in other territories, in certain cases, the Pope exercises temporal jurisdiction ⁴⁴ casualiter.” He explains this by saying that he does not wish to interfere with other men’s rights, and he recognises that Christ bade men give to Caesar what was Caesar’s, and refused to decide the case of the man who asked him to judge between him and his brother about their inheritance. But, he continues, in Deuteronomy the principle is laid down that in difficult and obscure cases the matter should be referred to the decision of the priest, and that his judgment should be accepted. He urges that the Pope occupies the position of the priest in the Deuteronomic legislation, and that this principle applies especially to those cases where there is any uncertainty whether the matter belongs to the ecclesiastical or the secular authority?

This is a far-reaching claim, and in the course of the thirteenth century furnishes one of the starting-points for the most extreme claims made by some writers, that the Pope possessed in the last resort all temporal as well as all spiritual authority.¹ But that Innocent III. himself contemplated such an interpretation of his claim seems very doubtful, especially in view of the great caution with which, as we have seen, he expresses himself? Still it remains true that Innocent III. does in this passage, clearly though incidentally, set forward the claim that in cases of conflict between the spiritual and the temporal jurisdiction, the spiritual power is to decide. It must, however, be remembered that the incidental statement of such a view in a passage in the Decretals does not justify the assertion that it was an established principle of the Canon law that in cases of conflict between it and the secular law, the Canon law was necessarily to prevail. The normal view of the Canon law down to the thirteenth century is that the sphere of the two systems of law are distinct, and that each is supreme in its own sphere.

If there were grave difficulties in adjusting the relations of canon law and secular law, it was even more difficult under the terms and traditions of mediaeval society to adjust the relations of the clergy and the laity to the two authorities. It cannot seriously be questioned that Gelasius and the ecclesiastical writers of the ninth century clearly recognised that in secular matters the clergy were subject to the jurisdiction of the secular power? But there had gradually grown up in the later centuries of the ancient empire a great system of exemptions of the clergy from the jurisdiction of the ordinary secular courts, and these exemptions continued and developed in the new states which grew up on the ruins of the ancient empire in the West. In an earlier chapter of this volume we have discussed the treatment of these exemptions by the civil lawyers, and have pointed out the extent to which they were

founded upon the legislation of the emperors from Constantine to Justinian.¹ We must now consider the mode in which these matters were discussed and the conclusions which were maintained by the canonists and the Canon law.

' It is not necessary to discuss the question of the procedure in ecclesiastical cases where the clergy were concerned. No canonist suggests that in such cases any one but the bishops had jurisdiction. The really difficult question arises as to civil and criminal cases in which the clergy were concerned. It would take a long time to go through all the canons referring to the subject; but the very detailed discussion by Gratian will serve to give a sufficiently clear impression of the general position of the canonists. In the first Question of the eleventh Cause Gratian has collected a great mass of canons bearing upon the subject, and adds his own observations and conclusions. He first cites many authorities which seem to show that the ecclesiastic must not be brought before the secular courts unless he has first been degraded. To this, he says, it has been replied that while the clergy, as far as their office is concerned, are only subject to the bishop's authority, they are under the emperor so far as relates to their estates, for it is from the emperor that they have received them; and he refers to that famous passage which is quoted in ' Distinction ' viii. 1, in which Augustine maintains that property is held only by the laws of the emperor. Gratian then cites a number of canons which seem to teach that the clergy must pay taxes to the emperor, and that the bishops are not to interfere in secular matters, and says that it is therefore contended that in civil cases the clergy are to go to the secular courts, while they are not to be taken to the secular courts in criminal cases unless they have been degraded. But he urges emphatically that, plausible though this may seem, the canons and the secular law do actually forbid that the clergy should be brought before the secular courts either in a civil or a criminal matter, and cites a number of canons which assert this principle. And, finally, he concludes that unless in a civil case the bishop refuses to deal with the matter, and until in a criminal case the cleric has been degraded, the clergy must not be brought before either a civil or a criminal court.¹

This conclusion of Gratian does fairly represent the whole tendency of the Canon law in this period: the treatment of the subject by Bufinus and Stephen of Toumai is for the most part the same?

The clergy are thus, in the normal canonical theory, exempt from the jurisdiction of the secular courts. We have, in considering the matter, already touched upon the question of the taxation of the clergy by the secular authority, but we must consider this a little further. The treatment of the subject by Gratian is not very full, and is incidental to a discussion of the canons which prohibit the bearing of arms by the clergy, but it will serve to illustrate the canonical view. Gratian holds that those ecclesiastics who live on tithes and first-fruits are free from all secular taxation. As to those who hold estates and houses, he first suggests that they are liable to pay taxes, but then raises the question whether even these properties are liable to taxation, and, after quoting some authorities which seem to justify the view, he finally concludes that the clergy are only to pay taxes on those things which they have bought or have received as gifts from living persons.¹ Gratian's treatment is both inadequate and obscure, but it may suffice for our present purpose, which is, not to discuss the question of the taxation of the clergy in the Middle Ages, but to consider the theory of the canonists as to the relation of the clergy to the secular power.

When we have recognised the whole effect of the immunities of the clergy from the jurisdiction of the secular courts, and from taxation of certain sorts, we can ask whether we are to conclude that the canonists held that the clergy were not properly subject to the secular authority. Such general phrases as those of Stephen of Tournai which we have quoted¹ might almost seem to suggest this. But such a conclusion was not actually drawn by the canonists. We have just seen that Gratian admits that on certain kinds of property the clergy must pay taxes, and he seems to give as the reason for this that certain kinds of property are held by the clergy under the sanction of the secular power. In virtue of this fact then at least, the clergy, so far as they held such property, are subject to the secular power. This seems to be what was meant by Innocent III. in that decretal which we have cited in a previous chapter, when he says that the emperor has superiority in temporal things, but only over those who hold temporal things from him? It is not clear from the passage as it stands whether Innocent meant to admit that some of the clergy held temporal things from the emperor, but he probably did so, while he in the same passage emphatically repudiates the criminal jurisdiction of the secular power over the clergy, on the ground that this only extends over those who use the sword.

The principle that in some sense the clergy are normally subject to the temporal power is very clearly maintained by Rufinus in a passage in which he asserts that the Pope is in no sense subject to this authority, but that the metropolitan is subject with respect to secular matters? Damasus, indeed, goes much further, and maintains that as Christ and His apostles were subject on earth to the emperor, so must their successors also be subject, and he repudiates the doctrine that the Pope has the two swords.¹ Damasus, however, would seem to have belonged to the anti-papal party, and his statements must be taken as representing that position. On the whole, it seems to be fairly clear that the Canon law, as late as the Decretals of Gregory IX., knew nothing of a theory that the clergy are outside of the sphere of secular authority. As ecclesiastics they may be so, but as men they are, in some degree at anyrate, subject to it.

The two ^{££} peoples," then, of the clergy and the laity, are not to be conceived of as living wholly separate from each other under different jurisdictions. The clergy are in some measure under the secular authority, and the laity under the ecclesiastical. But it is also clear that the clergy have some special rights and obligations of intervention in secular affairs. We have in the last chapter discussed the question whether these canonists believed that the Church exercised supremacy over the State, and we have seen reason to conclude that this was not normally the case. We must now, however, be careful to notice that the Canon law does maintain that the Church has the right and the duty to intervene in certain cases for the defence of those who have been unjustly treated by the secular power.

We can trace this principle throughout the canonists with whom we are dealing. Regino, Burchard, and Ivo cite a canon which lays upon the bishops the duty of remonstrating with those judges and others who oppress the poor, and bids them, if their intervention should be ineffectual, address themselves to the king, that he may restrain the oppressor? Burchard and Ivo add a canon bidding the bishops excommunicate those judges and powerful men who oppress the poor, if they will not listen to their protests.² But this is not all: Ivo summarises the provisions of the Novels that if any suitor suspects the governor of the

province, he is entitled to demand that the bishop should sit with the governor to hear the case.³ We have already pointed out that this is the doctrine also of some of the civilians? To this is probably related the claim that in civil cases one party to a suit could take the case from the secular court to that of the bishop even against the will of the other party. This is quoted by Deusdedit, by Ivo, and by Gratian, and part of the passage is cited by Innocent III. in that letter which we have already discussed? As we have pointed out, the passage is contained in the Constitutions of Sirmond, and is a genuine law of Constantine, but was probably repealed by later legislation. No re-enactment of it can be traced in any genuine legislation of Charlemagne, but it is among the spurious Capitularies of Benedictus Levita. There is no trace of any recognition of this by the civilians; indeed its provisions go far beyond what they recognised. But the general principle of the recourse to ecclesiastical authority in defect of justice was recognised by them, and was clearly based upon the legislation of the ancient empire.

The Decretals are generally careful to limit the claim of the spiritual court, with respect to secular matters, to the case of defect of justice. We have already quoted two passages which illustrate this ;¹ but as the matter is so important, it is worth while to take note of some other passages. In a Decretal letter addressed to the Archbishop of Rheims by Alexander III., in answer to a question of the Archbishop whether an appeal could be legitimately made from a civil court to the Papal See, he says that such appeals could be made by those who were subject to the Pope's temporal jurisdiction; but though the custom of the Church might permit such appeals even in other cases, the strict law did not allow them? Again, Innocent III. refused to allow a certain widow to bring her case into the spiritual court unless it related to matters which belonged to the ecclesiastical judges, unless the secular court refused to administer justice to her?

The matter was doubtless one of great difficulty : a recourse of some sort to the bishop had no doubt been permitted in the later centuries of the ancient empire, and had been adapted to the elaborate organisation of the administrative and judicial system of those centuries, and during the period when the new political organisations of the Middle Ages were only slowly taking shape, an appeal to the ecclesiastical protection was natural, and probably not resented. But as mediaeval civilisation became organised and the secular power developed a coherent machinery, the intervention of the ecclesiastical authority in secular matters became more and more difficult to harmonise with the regular working of government. By the twelfth and thirteenth centuries, customs which had once worked without difficulty were becoming matters of serious controversy. But we cannot here discuss this subject fully: it cannot be properly dealt with in relation merely to the Canon or the Civil law.

The matter may very well here be concluded by noticing some sentences of Stephen of Tournai, which illustrate the hesitation and uncertainty which was coming over the minds of many practical men. Stephen comments upon a passage quoted by Gratian from Pseudo-Isidore, which lays down, in broad terms, the right of any oppressed person to invoke the protection of the Church, and then adds that it was a disputed question whether a layman could appeal in secular law-cases to the Pope. Some said that no such appeal could be made, while others maintained that this could be done, for even the emperor acknowledged the Boman Church as his mother, and the Pope as his father, for it was from him that he received the imperial crown.¹

. The claim that the ecclesiastical officers had not only the right but the duty of intervening in secular affairs seems to us specially important, as illustrating the fact that it was impossible to secure a complete separation between the two spheres of the spiritual and the temporal authorities. In some cases, at least, the ecclesiastical authority could intervene with regard to matters which primarily concerned the secular authority; or, to put the matter in another way, matters which seemed at first sight of purely temporal significance might frequently prove to have a relation with principles with which the spiritual authority was primarily concerned. Stephen of Tournai's facile phrases about the separation of the two spheres were misleading rather than illuminating.

It is important to observe that in another direction still this receives important illustration. There are traces even in the Canon law of the eleventh and twelfth centuries of the principle that the laity had some, if an undefined, share in the government of the Church. We do not here discuss the question of patronage and investiture: these matters are so closely connected with the great controversy of the times that the canonical treatment of these subjects can only be considered along with the general history and literature of that subject: we hope to deal with the matter in another volume. But it is worth while to notice here that even the canonical collections of the eleventh and twelfth centuries contain passages which imply that the laity, formerly at least, had sometimes possessed the right to be present at the Synods of the Church. Some of the canonists reproduce older regulations which imply the presence of the laity at some Church assemblies. Burchard of Worms quotes the thirteenth canon of the Council of Tarragona, which enjoins upon metropolitans to summon to their synods not only the cathedral and diocesan clergy, but also some of the laity? Ivo cites a canon of the Fourth Council of Carthage in a form which implies that laymen might be present at synods, and bids them speak only on the permission of the clergy? These reminiscences of an older system of Church authority have some importance as indicating that even in the canon law of the eleventh and twelfth centuries there was still some tradition that the laity had some place in Church authority. This is further illustrated by the citation, both by Deusdedit and Gratian, of a sentence from a well-known letter of Pope Nicholas I. to the Emperor Michael, which repudiates indeed the claim of the Emperor to take part in the discipline of the Church, but admits that the Emperor and all the laity may perhaps have some claim to be present at those synods which deal with the faith, inasmuch as this is a matter which is related not only to the clergy but to all Christian people? . Such phrases may be difficult to reconcile with the general tendencies of the Canon law in the eleventh and twelfth centuries, but we must take account of them in estimating the whole character of the mediaeval position.

We have seen that the Canon law does not deny that the clergy are in secular matters subject to the authority of the secular power, though it insists upon the importance of certain important exemptions of the clergy from the jurisdiction of the secular courts and from certain kinds of taxation. It is not necessary to bring forward evidence to show that the layman is in spiritual matters subject to the jurisdiction of the Church. We have in the last chapter dealt with the question of the excommunication of emperors or kings: if the supreme secular ruler was thus subject in spiritual matters to the spiritual authority, there could be no doubt as to the position of the private layman. We have found no trace in those canonists whose works we have been able to use of any recognition of

the principle asserted by John Bassianus and Azo, that when the layman was brought before the spiritual court the secular judge was to sit with the bishop.¹ We shall recur to this matter in a later volume, when we deal with such well-known regulations as those of William the Conqueror in England, or of the Constitutions of Clarendon, that the king's tenants in chief and ministerials, and the men of the king's boroughs and domains, might not be excommunicated without the king's consent, or at least until the matter had been brought before the king or his Justiciar.²

But it is necessary here to take account of an aspect of the canonical theory of excommunication which we have not yet had occasion to consider, and which is sometimes overlooked. We have in the last chapter briefly illustrated the tremendous nature of excommunication, and its far-reaching consequences. But we must now be very careful to recognise that the power of excommunication was not an arbitrary power, but could only be exercised for lawful reasons and in a lawful manner. An unreasonable or unjust sentence of excommunication had not in the canonical theory any final validity: it might be right that a man should submit to it until it could be revised by competent authority, but such a sentence had no effect before God. The canonical writers are quite aware of this principle,—indeed they discuss the matter very carefully, and lay down some conclusions without hesitation.

Cardinal Deusdedit has a very important summary of passages from the patristic writings dealing with the subject. An unjust excommunication injures him who inflicts the sentence rather than him who is sentenced; the Holy Spirit by whom men are bound or loosed will inflict on no man an undeserved punishment; justice annuls all unjust sentences; the man who is unjustly sentenced will be recompensed.¹

Gratian discusses the subject in the third Question of the eleventh Cause, and cites an immense number of passages bearing upon it. He first quotes many canons which seem to show that a sentence of excommunication, whether it is just or unjust, must be respected by the person condemned until he has brought his case before a synod of bishops.² But he then points out that there are also canons which seem to point to another conclusion—that is, that an unjust sentence is not to be obeyed;³ and he cites a number of canons which

might seem to prove this? and asks how these canons are to be reconciled with each other? He points out that sentence may be unjust for various reasons: it may be unjust in consequence of the intention of the judge, or in consequence of some impropriety in form, or in respect of the ground which is alleged for it; and he cites a number of canons bearing more or less upon these various causes. Gratian's own conclusions are not very clearly expressed, but he seems to mean that an unjust sentence of excommunication though it has no validity before God, must be respected, both by the excommunicated person and by others, until it has been brought before the competent authority, except in that case where a person has been excommunicated because he will not commit some wickedness?

There is an important passage in Stephen of Tournai which sums up the canonical view of excommunication. It must be observed, he says, that a sentence of excommunication can be regarded in three ways. A man may be excommunicated before God and the Church, when a man has justly been cut off from the Church on account of his crimes; or he may be in

the position of one who is excommunicated before God, and is therefore not a member of His body, which is the Church, although he had not been cut off from the Church by its sentence ; or again, a man may be excommunicated before the Church, but not before God, if the sentence of excommunication is unjust and founded upon no true cause?

Finally, it is important to observe that the Decretals draw the same distinction between the validity of excommunication before God and before the Church. Innocent III. in one passage does not hesitate to say that there may be cases where a Christian may know that a certain action will be a mortal sin, though it may not be possible to prove this to the Church, and that in such a case he must rather submit to excommunication than commit the mortal sin;² and in another place he lays it down explicitly that while the judgment of God is always true, the judgment of the Church may be erroneous, and that thus a man may be condemned by God who is held guiltless by the Church, and may be condemned by the Church who is guiltless before God.³

It needs no elaborate argument to demonstrate the great importance of this distinction between the formal and outward, and the real validity of the censures of the Church. Mediaeval history is full of examples of the defiance of these censures by men who had no thought of repudiating the spiritual authority of the Church. It would, however, be impossible to deal with this subject completely without passing from an examination of the theories of the Canon law into the discussion of the general history of these centuries, and that must be reserved for another volume.

CHAPTER XII.

SUMMARY.

WE have now endeavoured to consider some of the most important aspects of the political theory of the Civil and Canon lawyers down to the middle of the thirteenth century. Enough has been said to show the immense importance of distinguishing the tendencies of that period from those of the period which followed it; for the more closely we study the movement of ideas in the Middle Ages, the more clear does it become to us that we must distinguish very sharply between the views of those great thinkers who in the thirteenth century endeavoured to construct a coherent and logical system out of the infinitely complex elements of medieval life and thought, and the judgments of those earlier writers of the eleventh and twelfth centuries who represent an intellectual and political civilisation which was growing and changing too rapidly to allow them to stop and attempt to marshal their ideas in a systematic order. The great systematisers do no doubt represent the Middle Ages, but only in this sense, that they endeavour to fix and define, and therefore in some measure to stereotype, what had been a thing living and growing and continually changing. For there are few periods in the history of the world when the movement of circumstances and ideas was more rapid, and there is nothing which still obscures any real apprehension of the Middle Ages more effectively than the notion that these centuries were a period of fixed opinions and unvarying conditions.

In this volume we have dealt with some aspects of the political ideas implicit or formally expressed in a literature whose conceptions are directly founded upon antiquity, the civilians building primarily upon the ancient jurisprudence, the canonists primarily upon the Christian Fathers: they represent, therefore, some of the most important elements which the Middle Ages inherited from the ancient world.

If now we ask ourselves what are the most significant conceptions which they present, we may well begin with that majestic conception of law, presented to us both by civilians and canonists, as representing not the mere will or power of a community or ruler, but rather the attempt to translate into the terms and to adapt to the conditions of actual life, those ultimate principles of justice and equity by which, as they believed, the whole universe was controlled and ordered. In the civilians this is related primarily to the discussion of the nature and meaning of *aequitas* and *justitia*, and secondarily to their treatment of the *jus naturals*; while the canonists deal with it chiefly in relation to the *jus naturale* and its character as the standard to which all laws must conform, the norm or test to be applied to all institutions.

It is out of these conceptions that there grows the necessity of distinguishing between the world as it actually exists, and the ideal or perfect conception of the world and human life. And, again, canonists and civilians have alike inherited from the later philosophy of the ancient world and from the Fathers the conception of the distinction between the natural conditions of human life, which they think of as primitive, and the conventional institutions under which men actually live. Many of these conventions are in themselves to be reprobated, but are accepted as being the means by which men's vicious and criminal tendencies may be controlled, and they may be trained for the ideal.

We have dealt with the treatment of the institutions of slavery and property as illustrating this conception, but the theory of the State both in the canonists and civilians is also related to it. To them both the State is a sacred institution that is necessary and sacred as the means of establishing such a measure of justice and order as is attainable in this world.

The canonists do not indeed look upon it as natural in the stricter sense, but rather as a conventional institution, made necessary by men's vices, but still a sacred and divine remedy for those evils, and with this judgment the civilians probably agreed. They represent not so much the Aristotelian theory of the State, as that modification of it presented by some at least of the Stoic writers? It has indeed been urged by some writers of eminence that the ecclesiastical theory of the State denied its sacred character, and, following some supposed theory of St Augustine, held that the State did not really represent the authority of God. We shall have to return to this question in later volumes, and shall then try to reduce the complexities of mediaeval thought to some reasonable proportions. In the meanwhile, we must content ourselves with saying that this is not the conception of the canon law, not even of the Decretals, and that whatever may be the final conclusion about the general principles of the Middle Ages, the canonists at least as well as the civilians held to the principle of the sacred character of the State.

The civilians, as far as we can understand them, shared in these conceptions, but we also find in some of their writings an interesting attempt to establish the conception of the State as resting upon the natural relation between the whole society or university and its members.² It would seem that we have here a more organic conception of the nature of political society, as necessarily arising out of the constitution of human nature and the principles of social relations. And alongside of this and in close relation to it we have to recognise the great importance of the fact that the civilians repeated for the Middle Ages the principles of the Roman jurisprudence that the only source of political authority was the whole community, the university or *populus*. In our first volume we have pointed out the great significance of the fact that this was the normal theory which

the ancient world handed on to the Middle Ages and the modern world. This was not the less important, because the conception coincided with the native traditions of the barbarian societies ; the doctrine of the civilians stated clearly and explicitly what was implicit in the new constitutions.

There are indeed other aspects of the theory of the ancient jurists which do not correspond with the traditions of the new societies, and here the influence of the civilians is more complex, and it requires some care and some discrimination to estimate the whole nature of this. We have seen that they were divided upon the question whether the Boman people, in transferring their authority to the emperor, had wholly parted with their original authority. Some of them maintained that this was the case, and here we have what was undoubtedly a new and alien element in the mediaeval tradition. Some of the civilians maintained that the people having transferred their authority had done this once and for all, and that even their custom had lost its original force in making and abrogating law; and that thus the emperor was left as the sole and absolute legislator. This conception was new to the Middle Ages, and indeed it did not attain any great importance in these times : its development belongs to the period of the Benaissance, when, in the breaking up of the general fabric of mediaeval civilisation, the personal monarchies which reached their full development in the seventeenth century began to take definite shape. Some share in this development is probably to be traced to the influence of some of the civilians.

It is, however, a great mistake to suppose that this was the only or the most general view of the civilians, for many of them, including the great Azo, held quite another view, and maintained that the people had never really parted with their authority, that the ruler held a delegated authority which was not unlimited, while the people always continued to control all legislation by their custom, and might even if they chose reclaim the authority which they had entrusted to the ruler. And, as we have seen, Irnerius, Boger, and Azo are very clear in holding that the emperor, even though entrusted by the populus with legislative as well as administrative authority, could only exercise this with the counsel and consent of the Senate, which Azo, at least, held had received its authority from the populus. Their doctrine is generally related to the phrases of Theodosius and Valentinian in the Code, but we are left with the impression that we may here suspect also the influence of the contemporary constitutions.

The canonists have little to say directly upon this subject : some of them, indeed, like Rufinus, agree with those civilians who hold that custom has no longer any legislative authority, except with the consent of the ruler; but on the whole the great importance attached to custom in the canonical theory of law, and the final decision of the Decretals that custom, under the condition of a legal period of prescription, always retained the force of law, seem to throw the weight of the canon law on to the same side as the civilians like Azo.

It is difficult to summarise what we have said as to the theory of the relations of the two authorities of Church and State; but we may once again point out that in order to understand their relation in the Middle Ages we must begin by taking account of the fact, which is brought out with special clearness in the work of the civilians, that a great part of the exemptions of the clergy from secular jurisdictions and obligations, and a good deal of their claim to intervene authoritatively in secular affairs, is really to be traced to the deliberate organisation of society in the later empire, and especially by Justinian. And

finally, we think that an examination of the subject will have made it clear that while the Church had come to claim a tremendous authority in relation to the empire, it is not the case that the Church as represented in the deliberate judgments of the Canon law claimed to be supreme over the State. The normal doctrine of the Canon law down to the time of the Decretals is the same as that of the fifth and the ninth centuries, that the two authorities, the ecclesiastical and the civil, were equally and separately derived from Christ, and that strictly each was supreme in its own sphere.

VOL. 111.

POLITICAL THEORY

FROM THE

TENTH CENTURY TO THE THIRTEENTH

BY

A. J. CARLYLE, M.A., D.LITT.

INTRODUCTION.

IN the last volume we endeavoured, to determine the nature of the influence of the ancient world on the political theory of the Middle Ages, as it is represented in the systems of mediaeval Roman and Canon law. It seemed well to consider these elements of mediaeval theory first, because in order to appreciate rightly the nature or characteristic developments of political thought, we must first consider carefully how much had been inherited from the ancient world, and also because with the help of these more or less systematic works we can distinguish more easily between the normal opinions of men and abnormal or eccentric views.

We must now face the task of trying to determine what were the characteristic political theories of those centuries of the Middle Ages during which all ideas were in a state of ferment, during which nothing was fixed or systematic, but every day as it brought new conditions so also it brought new theories, new ideas, often in such bewildering abundance as to make it difficult to estimate their value.

We turn in this volume first to the consideration of the characteristic conceptions of feudalism and their influence on the development of political ideas, and we have found that in order to deal with this effectively we must carry our study down to the end of the thirteenth century. For the rest we deal with the political theory as illustrated in general literature only to the end of the twelfth century, for in the thirteenth century the great schoolmen began to reduce the world of ideas and theories to a systematic form. The work of these great systematic thinkers was indeed often admirable and enlightened, and we propose in later volumes to deal with this, but there has been in our judgment some tendency to misunderstand mediaeval thought, because it has been studied too exclusively in these systematic writers. There has been a tendency to conceive of it as representing a completely articulated system of fixed principles and logical deductions from them. This is true, strictly speaking, only of the thirteenth century, and even then only of the great schoolmen. The literature of the centuries from the tenth to the twelfth century represents no such systematic mode of thought; the men of these times had indeed in the writings of the Christian Fathers a great body of theories and principles which had a constant influence upon them, while their habit of life and feeling was grounded in the traditions of the new Teutonic societies, but in neither of these had they an ordered and articulated system of political thought, but rather a body of principles, significant indeed and profound, but not always easily to

be reconciled with each other. The history of the social and political ideas of these centuries is the history of the continual discovery of the relation of the traditions and principles which men had inherited to the actual circumstances of the time.

Our main difficulty in handling the matter is due not to the want of materials, for there is almost an over-abundance of these, but rather to the variety and complexity of the materials, and to the difficulty necessarily inherent in the attempt to set out in some systematic terms the conceptions of men who were not systematic thinkers, while they were acting and thinking energetically and often audaciously. And if the materials are abundant, the political ideas themselves are somewhat bewildering in their complexity. It has sometimes been thought that the political theory of the Middle Ages was simple and clear, because it was dominated by the principle of the unity of the world under the supremacy of the spiritual power. But the real truth is very different. We do not doubt that these conceptions had a real importance, but there were other aspects of the theory of society which were at least equally important, and which were more permanent in their importance. We cannot rightly apprehend the character of mediaeval civilisation if we conceive of it as something isolated from the continuous movement of Western life, for indeed as it was in a large measure founded upon the civilisation of the ancient world, so also it contained the elements of the modern.

Let us try to sum up briefly the general characteristics of the political ideas with which the men of the Middle Ages set out.

It is evident to any student of the political thought of the Middle Ages that it was immensely influenced by the traditions of the Christian Fathers—it is from them that it directly and immediately derived the forms under which it expressed its own conceptions. The formal political theory of the Middle Ages is dominated by the contrast between nature and convention, to the Fathers and to the great majority of medieval writers, until St Thomas Aquinas and the recovery of the Aristotelian Politics, all the great institutions of society are conventional and not natural. Men are, in this view by nature free and equal, and possess the world and the things in it in common, while coercive government and slavery and private property are conventional institutions which were devised to correct the vices of human nature when it lost its first innocence. These great formal conceptions indeed control the terms of political theory until the end of the eighteenth century, until Rousseau and Burke and the beginnings of the modern historical method. In the first volume of this work we have endeavoured to set out in detail the characteristics of this mode of thought, and we can here only refer the readers to this.

If, however, we are rightly to appreciate the relations of mediaeval thought to that of the ancient world, we must remember that although these theories came to the Middle Ages primarily through the Christian Fathers, they were not distinctively Christian conceptions, but rather the commonplaces of the later philosophical schools, and the Fathers learned them in the schools and universities where they were educated. The forms of the political theory of the Middle Ages represent therefore an inheritance from the Stoics and other philosophical schools of the Empire.

We must consider a little more closely the character of these theories. To the Stoics and the Christian Fathers the institutions of society were conventional, not natural, and they understood the natural as being in the first place the primitive. But the natural was to them something more than the primitive, it represented something which was also

essential and permanent. It was necessary for the due order of human life that men should rule over each other, and the Fathers added to this the conception that in some sense slavery was a punishment as well as a remedy for human vice. But both philosophers and Fathers maintained that the freedom and equality of human nature continued to be real. Their conception of human nature was radically distinct from that which is represented by the Aristotelian philosophy. To them there was no such thing as a naturally servile person, for the soul of man was always free. This principle is indeed the exact reverse of that of Aristotle. He found the ground and justification of slavery in his judgment that only some men were in the full sense rational and capable of virtue, while others were not properly and fully possessed of reason, and could not therefore in the strict and complete sense of the word possess virtue. Whatever may have been the foundation of this judgment, the judgment had disappeared before the Christian era, and Cicero had in a famous passage, summing up the philosophical judgment of his time, repudiated it in the strongest terms.¹ Seneca, a hundred years later, repeats the judgment in a memorable phrase. Men's bodies, he says, may be enslaved, the mind is free.² These principles are also those of the Christian faith. To St Paul slavery is a merely external and accidental condition, the slave is just as capable of the highest life, the life of communion with God, as the freeman. His great words, "There can be neither Jew nor Greek, there can be neither bond nor free, there can be no male and female : for ye are all one in Christ

Jesus," represent the principle of all Christian writers.¹ We have in the first volume pointed out how emphatically these principles are restated in the literature of the ninth century,² and in the second volume how they are repeated by the Roman jurists and the Canonists of the Middle Ages.³

It is not, however, only slavery which was held to be conventional, the same thing applies also to private property. In the primitive and innocent conditions of human life there was no such thing as private property, but all things were common. Private property is the result of man's greed and avarice, and is justified only as a limitation of this. Private property is indeed lawful, but it is the creation of the State, and is determined and limited by its authority ; and while the institution is lawful under the sinful conditions of human nature, the good things which God has given men through nature are still intended for the use of all. When the rich man assists the poor he is doing an act of justice, not of charity.⁴

The institution of government is also conventional, and not natural. To the Stoics and the Fathers the coercive control of man by man is not an institution of nature. By nature men, being free and equal, were under no system of coercive control. Like slavery, the introduction of this was the result of the loss of man's original innocence, and represented the need of some power which might control and limit the unreasonable passions and appetites of human nature. This was the doctrine of the Christian Fathers, but it was also the doctrine of the Stoics as represented by Seneca,⁵ and it is impossible to understand the mediaeval theories of government if we forget this. It was not till Aristotle's Politics were rediscovered in the thirteenth century that St Thomas Aquinas under their influence recognised that the State was not merely an institution devised to correct men's vices, but rather the necessary form of a real and full human life.⁶ The formal conceptions of the Middle Ages were, however, on this point little affected by St Thomas. It is

evident that the conception of the conventional and “unnatural ” character of the state was too firmly fixed to be shaken even by his authority, and that it passed with little alteration into the political theory of the sixteenth, seventeenth, and eighteenth centuries, and that, as we have said, it was not until Rousseau in the ‘ *Contrat Social* ’ vexed the uxgamu conception of the statu,’ ind till the Clbe of the hlbollCul method of studying uibtLutians, Chat this mode of thoughn paabed away , and it lingexed on in bhe nineteenth uencuxy in tne form of the police theory oi the state,01 HerheibSpenCex and bduEngnan ladicals.

The iormai theory jf nature and convention tn toe Middle Ages represents the principles of the post-Aristotelian philosophy, as mediated by the Christian Fathers. We must refer the reader to the second volume of this work for a discussion of the place of these conceptions in the Roman and Canon law of the twelfth century.

So far, then, we have been dealing with conceptions which dominate the theories of the Middle Ages, and which had come to them through the Fathers, but which were not strictly speaking distinctively Christian, but rather represented the general principles of the post-Aristotelian philosophy. The political theory of the Middle Ages was also however profoundly affected, or rather controlled, by certain conceptions which were distinctively Christian in their form, if not in their origin.

The first of these is the principle of the autonomy of the spiritual life, which in these ages assumed the form of the independence of the spiritual authority from the control of the temporal. We have endeavoured in the first volume to give some account of the nature and early forms of this conception. It finds characteristic and permanently important expression in the phrases of the letters and tractates of Pope Gelasius I., in which he lays down the great principle that the . . spiritual and the temporal authority each derives its authority from God, and that each is independent of the other within its own sphere, while each is dependent in the sphere of the other.²

We have in the second volume endeavoured to give some account of the treatment of this principle by the Civilians and Canonists of the twelfth and thirteenth centuries.¹ We shall have to consider in detail the relation of these principles to the theory and structure of mediaeval society. We shall have to deal with the theory and the practical nature of the relations of the spiritual and temporal powers in the Middle Ages, to plunge into the great conflict of the Papacy and the Empire, to try to disentangle the real and vital significance of that great dispute whose clamour fills these centuries.

But before we do this we must remind ourselves of the real nature of the problem, the real and fundamental principle which lies behind the confused noise of factions. Behind the forms of the great conflict we have to recognise the appearance in the consciousness of the civilised world of principles new and immensely significant. For behind it all there lies a development of the conception of individuality or personality which was unknown to the ancient world. We cannot here pretend to measure fully the gulf which lies between the Platonic and Aristotelian philosophy and that of the Stoics, and the other later philosophical systems, but it cannot be doubted that the gulf is profound. The phrases, for instance, in which Seneca describes the self-sufficiency of the wise man may be exaggerated and overstrained. No one, he says, can strictly be said either to benefit or to injure the wise man, for he is, except for his mortality, like God himself ; he is indeed bound to the service of the common good, but if the conditions of life are such as to make it impossible for him to take part in public affairs, he can withdraw into himself and still

serve the same cause by developing his own nature and character.² The phrases may be overstrained and rhetorical, but they represent a sense of individual personality which is immensely significant, an apprehension of aspects of human life which are sacred and inviolable, independent of the authority, and, in his view, even of the support of society.

The changes which can be traced in the history of West era thought can be observed with equal clearness in the Semitic literature of the Old Testament. There are few sayings more significant than those indignant words in which Ezekiel repudiates the traditional conceptions of Israel. "The soul that sinneth, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son : the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him." ¹ The solidarity . of the primitive and ancient group was giving way before the development of a new apprehension of individuality.

It is this apprehension to which a new impulse and force was given by our Lord and his disciples. To them the soul of man has an individual relation with God which goes beyond the control of the society. The principles of the Christian religion represent, on this side, the same development as that of Ezekiel and the Stoics, and it is on this foundation that the civilisation of the mediaeval and modern world has grown up. This does not mean that religion has no social aspect, or that the political societies have no moral or spiritual character, but it does mean that men have been compelled to recognise that the individual religious and moral experience transcends the authority of the political and even of the religious society, and that the religious society as embodying this spiritual experience cannot tolerate the control of the State. There are aspects of human life which are not and cannot be under the control of laws or authority of the State

It is true that the great individual development has often been misinterpreted and exaggerated, and the greatest task of the modern world is to recover the sense of the organic unity of human life, that sense of unity which to the Christian faith is equally vital with the sense of individuality. The recovery of that sense of unity by Rousseau and Burke does indeed represent a great moment in the development of human apprehension, and separates the political (function and action of the nineteenth century by a great gulf from that of the preceding centuries. We are once again Aristotelian, but with a great difference, for the apprehension of individual personality remains with us.

It is these convictions which lie behind the great struggles of the spiritual and temporal powers in the Middle Ages, the greatness of the conflict is some measure of the immense difficulties which beset then, and even now, the attempt to disentangle the sphere of religion from those aspects of life which are under the control of the State. For it must not be supposed that this was an easy thing to do. In the first volume we have endeavoured to point out how in the ninth century, while men clearly recognised in principle the distinction between the sphere of the two great authorities, yet in actual practice the two authorities constantly overlapped.¹ These difficulties became far greater in the centuries which followed, and we cannot measure the significance of the events which took place, or estimate the real character of the theories which were put forward, unless we continually take account of this.

The political theory of the Middle Ages then inherited a great conception of the independence of the Church, and we have here the first conception which was distinctively Christian, at least in form.

There is, however, another conception which the Middle Ages inherited from the ancient world which is also distinctively Christian in form if not in substance. This is the principle of the divine nature and origin of political authority. We have dealt with the origin and nature of this conception in the first volume,² and have in the second volume examined the treatment of the subject by the Civilian and Canonists of the twelfth century,³ and it is unnecessary to say more about it here, as we shall have to consider its significance very carefully in this volume. But we must be under no misapprehension, whatever may have been the precise significance of St Augustine's treatment of the nature of secular authority, and the extent of its influence, the tradition which had come down to the Middle Ages was substantially clear and emphatic, and that was that the secular power is a divine institution and derives its authority from God.

This conception had been interpreted by some of the Fathers, and notably by St Gregory the Great, as meaning that the authority of the secular ruler was in such a sense divine that it was irreligious and profane to resist, or even to criticise it.¹ The theory of the "Divine Right" of the King is a patristic conception whose influence in the Middle Ages we shall have to consider, although it was not till the period of the Renaissance that it can be said to have received its full development, and it was then related to the development of the absolute monarchy in Europe.

Such, then, are in general outline the principles of political theory which the Middle Ages inherited by direct and continuous tradition from the ancient world, and these influences must be clearly and sharply distinguished from those which came to them in the twelfth century through the revived study of the Roman jurisprudence, and in the thirteenth century through the rediscovery of Aristotle's Politics. We have dealt with the former of these influences in the second volume, the latter we must leave till we can deal with the thirteenth century in a later volume. It was in the main through the writings of the Fathers that the continuous tradition came, but, as we shall have occasion to see, it was reinforced throughout these centuries by the energetic study of the Latin authors whose works had survived. We have seen that in many most important aspects this continuous tradition represents rather the general political ideas of the last centuries of the ancient world than distinctively Christian conceptions.

We must now observe that the order of society in Western Europe was based largely upon principles which underlay the new societies. There has been and there still is much controversy on the exact degree of the independence of the Teutonic constitutions and political principles. The great constitutional historians of the middle of the nineteenth century, like Waitz and Stubbs, assumed that the ancient world had little or no influence in determining the characteristic forms and principles of the government of the Teutonic state. In the latter part of the nineteenth century a very learned and capable body of historical scholars, of whom the chief were, on the Continent, Fustel de Coulanges, and in England, Seebohm, argued that in reality much which had been thought to be Teutonic was merely an adaptation of the forms and principles of the provincial administration of the later empire. We do not need for our purpose to attempt a dogmatic decision of the controversy, though we cannot conceal our own conviction that the balance of historical research and discussion has turned strongly against the Romanist view. For our purpose it is enough that we should observe the nature of the

principles which were implicit in the structure of the new societies, and which found a large measure of reasoned expression in the literature especially of the ninth century.

Some of these principles are of great significance. The first and fundamental principle implicit in the organisation of the new societies is the supremacy of the law or custom of the community over all its members, from the humblest free man to the king. And the second is that there could be no succession to kingship without the election or recognition of the community. There is here indeed an obvious parallel, but also an obvious divergence in the structure of the Teutonic societies, as compared with that of the Roman empire. It was indeed the fundamental principle of the Roman jurists that the source of all political authority was the Roman people, that the emperor held his authority only because the Roman people had been pleased to confer it upon him.¹ But there was this far-reaching difference between the Roman legal theory and the principles of the Teutonic societies, that the Roman theory was a theory of origins, while the Teutonic principles were those of actually existing conditions. It was not merely that the Teutonic king required the consent or recognition of the community for his accession to power, but that he was not over the law, nor its creator, but under it. The Roman doctrine of the legislative authority of the emperor has no counterpart in

the principles of the Teutonic societies, the law was the law of the community, not of the king. It is true indeed that in the earlier Middle Ages there was normally no such thing as legislation in the modern sense, the law, strictly speaking, was nothing but the traditional custom of the community, and legislative acts were, properly speaking, nothing but authoritative declarations of custom. As the changing conditions of mediaeval life finally made deliberate modification of these customs inevitable, such action was taken, though reluctantly, but could only be taken with the assent, expressed or tacit, of the community.

Here are indeed political principles or ideas of the highest moment, derived not from the traditions of the ancient world and empire, but rooted in the constitutional practice of the new societies. We have endeavoured to set out the evidence for the predominance of these conceptions in the first volume,¹ but their significance cannot be fully appreciated without a study of the more important works on the constitutional history of the various European countries in the early Middle Ages.

It is in relation to these principles that we have to study the appearance of the doctrine of the social contract; that is, the conception of an agreement or bargain between the people and the ruler. In the popular mind this conception is supposed to belong to the seventeenth and eighteenth centuries, but the real truth is that it is a mediaeval conception, and that it arose primarily out of conceptions and circumstances which were characteristic of mediaeval society. This principle or theory has some place in ancient literature, especially in Plato's 'Laws',² and a phrase of St Augustine's has been sometimes quoted as related to it, though probably without any sufficient justification,³ but there is no evidence that there is any continuity between the Platonic theory and that of the Middle Ages. We have in the first volume pointed out the circumstances out of which we think it arose,⁴ and, as we shall have to deal with it in detail in this volume, we need only here say that it seems to us clear that its origin is to be traced to the promises of

obedience to the law, and of good government taken by the king on his accession. It was in the eleventh century that the conception found a formal expression, but the principles

which lay behind the formal expression were already in existence, and were firmly rooted in the constitutional order of the early Middle Ages.

In approaching the subject of the nature of the political theory of the great central period of mediaeval civilisation, from the tenth to the thirteenth centuries, we must then first be careful to observe the nature of the general principles which the men of that time had inherited. These principles were complex, and no complete or systematic treatment of them was made until the thirteenth century. It may indeed be doubted whether the various elements were capable of being brought into an organic relation with each other, but we must not here anticipate the discussion which belongs to later volumes. Whether in the end these various conceptions were capable of being fused into an organic whole or not, we must recognise that they all have a real and significant place in mediaeval theory. The great formal conception of the distinction between nature and convention, which came from the post-Aristotelian philosophy in which the Christian Fathers were trained ; the principle of the equality and freedom of men which arose out of this and the Christian tradition ; the immensely significant conception of the necessary freedom of the spiritual life and the spiritual authority which specially represents this ; the conviction of the sanctity of the political order ; the principle of the supreme authority of the law or custom of the community, and of the King as responsible to govern according to the law, —these conceptions or principles dominated the sentiment and the theory of all mediaeval society.

Our present task is to consider the development of these conceptions under the actual circumstances of European society from the tenth to the thirteenth centuries, and to inquire how far they may have been modified or superseded by other principles. For the new times brought new conditions, new and important forms of political and social relations. \\ e shall

have especially to consider how far the development of feudal ideas, and the organisation of European society on the basis of feudal tenure, may have modified or overlaid earlier principles ; how far again in the great conflicts between the spiritual and the temporal powers the conception of the sanctity and autonomy of either may have been questioned or denied. The development of mediaeval society was very rapid, and the intellectual development was even more rapid than that of the organisation of society. The greatest difficulty indeed with which the historian has to contend, in trying to interpret the Middle Ages to the modern world, is the impression that the civilisation of these times was stationary and rigid, that the mediaeval world was unlike the modern, specially in this, that it was unchanging, while we perpetually change. This tradition is primarily derived from the ignorance and prejudice of the men of the new learning and the Renaissance, and lingers on, not in serious history, but in the literary tradition, and in the prejudices which arose naturally enough out of the great struggles of the Reformation and the Revolution. If we are to study the Middle Ages intelligently, if we are to appreciate their real relation to the modern world, we must dismiss from our minds these notions of a fixed and stereotyped society, we must rather recognise that there have been few periods in the history of the world when the movement of thought and of life was more rapid than in the twelfth and thirteenth centuries.

When we attempt to trace the history of political ideas in the Middle Ages, we are at once confronted with the fact that, after the active political reflection which is represented in the literature of the ninth century, there follows a considerable period

from which very little indeed of political theory has survived in literature. From the end of the ninth century till the middle of the eleventh the references to the principles or ideas of politics are very scanty indeed. We have indeed to remember that it is probable that a great deal of literature, especially in the vernacular languages, has disappeared, but it is at least a probable conclusion from what has survived that

there was not much reflection upon social and political questions, and that it was not till the middle of the eleventh century that the great political agitations in Germany, and the development of the great conflict between the Papacy and the Empire, compelled men to question themselves as to the principles which underlay the order of society.

This does not mean that during this time no important changes were taking place in the structure of European society ; on the contrary, in some respects the period was one of great and significant development. It was during these years that feudalism was taking shape and form, establishing itself as a system of social and economic and military organisation, and in some degree affecting the structure of government. How far the growth of feudalism affected the principle or theory of political organisation is the first important question which we have to consider.

It was during these years that European civilisation was being rescued from a second great wave of barbarism, which threatened for a time to overwhelm it. For upon the confused faction fights which distracted Western Europe while the great empire of Charlemagne was breaking up, there fell the torrent of the second barbaric invasion. The Norsemen on the North and West, the Magyars on the East harried and plundered, and for a time it seemed as though the work of the preceding centuries would be completely undone; and indeed Europe very nearly relapsed into anarchy, and Church and State were almost overwhelmed in a common destruction. But the victory of Alfred over the Danes, of Otto the Great at the Lechfeld over the Magyars, and the limits within which the Norse invasion of France was finally contained, mark the fact that the new civilisation was stronger than the forces which attacked it, that the new barbarians had to reckon with a civilisation which was not worn out like that of the Western Empire which the forefathers of the Franks and the Englishmen had overthrown five centuries earlier, but with one which was living and powerful and capable of a rapid recovery and growth. The new invasions did indeed leave profound traces behind them, but the greatest and most powerful of the invaders, the Normans who settled in

North-Western France, proved rapidly that they were capable not merely of conquest, but that they could contribute greatly to the progress of the very civilisation which for the moment they had shaken.

The development of feudalism was in great measure the result of the downfall of the Carolingian civilisation, but the effects of this can also be traced in the relations of the Papacy and the Empire. The breaking up of the Empire of Charlemagne might indeed seem to have set the Papacy at liberty, but actually it left it under the tyranny of the barbarous factions of the Roman nobles, and its degradation was even deeper than that of the State. It was rescued from this in the tenth century by the Ottos, and in the eleventh by Henry III., but the conditions of its deliverance held in themselves the seeds of disaster. The emperor exercised, and for the time with excellent results, a very large measure of control over the Church, and especially over the appointment of its chief ministers, but it was impossible that the Church should in the long run acquiesce in this. The principle of its necessary independence was too firmly rooted in its history, and it

was the attempt to recover and vindicate this which led to the great conflict of the Papacy and the Empire, of the spiritual and temporal powers in the various European countries. This conflict in its turn contributed a great deal to compel men to consider and make explicit the fundamental principles of the structure and organisations of society, and thus to produce those energetic and audacious developments in political theory which we have to consider.

We have, then, to deal with three great subjects—first, the nature of the principles implicit in feudalism, and the effect of these principles upon political ideas ; second, the characteristic political conceptions of the eleventh and twelfth centuries as related to the development of the general political and social structure of Western civilisation ; and thirdly, the forms and theories of the relations of the temporal and spiritual authorities. It is indeed true that we cannot isolate these various aspects of mediaeval life and thought from each other, but they do in some measure really represent the operation of different forces, and

we have to consider how far it may be true that they tended to give rise to different conceptions or principles. We shall have to make the effort finally to bring our reflections upon them together, and to form some unified view of their effect upon the principles of mediaeval life, but for the time being we have found ourselves driven to deal with them separately.

We have found that the adequate treatment of the subjects has required so much space that we have decided to deal with feudalism and the general political ideas in this volume, and with the relations of the temporal and spiritual powers in the next.

We deal with feudalism first, not because it was in our judgment the most important element in the structure of mediaeval society, but because it has often been thought to have been so, and because this at least is true, that whatever its influence may have been, it represented a new element in civilisation. In dealing with it we shall be obliged to transcend the limits of time which we have set to the general scope of this volume. For the significance of feudalism in relation to political theory cannot adequately be discussed without taking into account the great feudal law books of the thirteenth century ; and, what is more important, the system of feudalism represents an organic development culminating in the latter years of the thirteenth century, which cannot be understood unless we take account of the whole process of its development. We are, of course, aware of the risk that we run of reading back the conceptions of the thirteenth century into the eleventh and twelfth, and we shall do our best to guard against this risk.

PART I.

THE INFLUENCE OF FEUDALISM ON POLITICAL THEORY.

CHAPTER I.

PERSONAL LOYALTY.

THERE is perhaps no subject in mediaeval history which is so difficult as that of feudalism. Its origins are still obscure and controverted, its development belongs largely to the tenth century, and there are few periods of mediaeval history where the sources of our information are so scanty and so fragmentary, and in the literature which has survived there is only a little that can be said to bear directly upon feudalism. And, finally, its real nature and essential characteristics have been so confused by the laxity of literary usage that it is difficult to say what is meant by the word.

Feudalism is a system of personal relations, of land tenure, of military organisation, of judicial order, and of political order. It affected the life of every class in the mediaeval community, from the villein to the king or emperor, and it even affected profoundly the position of at least the greater clergy, the bishops and abbots. There are, indeed, few aspects of mediaeval life which were not touched by it, and it is therefore natural that it should be thought that it must have profoundly modified both the institutions and the political ideas of the Middle Ages.

It is not our part here to deal with the first of these subjects, the influence of feudalism on the institutions of the Middle Ages, its direct effects upon the forms of the great constitutional development which culminated in the Parliament of Edward I. and the States-General of Philip the Fair, and the parallel developments in other European countries. We cannot even attempt to summarise the results of the work of the constitutional historians, for any summary would probably mislead rather than illuminate. But it is possible to say that while feudalism left for centuries deeply marked traces on the social and political structure of European society, and while the great systems of national organisation did indeed take into themselves elements which belonged to feudalism, they also represented principles which in their essential nature were independent of and even contradictory to some specific characteristics of the feudal system. In the end the king or the parliament, or both, came to be directly related to all the individuals who compose the State, and in their authority the local and personal authorities and jurisdictions of feudalism were finally lost. The royal justice at last absorbs all feudal justice, in the administrative authority of the crown all the areas of feudal administration are merged, and the legislative authority of parliament asserts itself as supreme over all feudal traditions and customs. The king and the parliament represent the nation, and the unity of the nation finally transcends all the separatist tendencies of feudalism.

It may even be said that the best example of this can be found in that country where at first sight feudalism might seem to have triumphed, for the unity of the German kingdom was finally destroyed, and the great fiefs became practically autonomous provinces. But it was not feudalism which triumphed, but territorialism. In the territorial areas there developed the same centralised authority and administration as in England or France, and it was no doubt that very fact which accounts for the failure of the constitutional movement of the close of the fifteenth century.

We have to deal here not primarily with institutions, but with the question how far feudalism affected the political ideas of the Middle Ages, how far its influence coincided with the

traditions which they inherited, and furthered the development of social and political ideas which were already present, or how far it may have tended to neutralise or modify them. We must be prepared to find that the influence of feudalism was very complex, and that it may have tended in different directions.

We begin by pointing out what may seem a paradox, that feudalism represents two principles which in their ultimate development may seem contradictory, but which yet affected the minds of the men of the Middle Ages at the same time. The first principle is that of personal loyalty and devotion, the second is that of the contractual relation.

The first principle is that which is represented especially in the poetic literature of the Middle Ages, and which has thus passed naturally enough into the literary as

distinguished from the historical presentation of the Middle Ages in modern times. We are all familiar with the romantic representation of mediaeval life as dominated by the sentiment of chivalrous loyalty and devotion. How much of exaggeration there is contained in this we shall presently see, but there are elements of real truth in it. And, more than this, these sentiments have a real and permanent importance in political as well as in social life. Human life in its deepest and largest terms cannot be lived upon principles of utility and contract. Whether in the family or in the nation the actual working of human life is impossible without the sense of loyalty and devotion.

This is the first principle of feudalism, and the second may well seem contradictory to it. For nothing could seem further apart than the conception of personal loyalty and the conception of bargain or contract as the foundation of human relations. And yet there is no escape from the conclusion that in the last resort feudal relations were contractual relations, that the vassal was bound indeed to discharge certain obligations, but only on the condition that the lord also discharged his obligations to the vassal. Here again it is evident that we are dealing with a principle which is reasonable and just, for in the long run human relations are impossible unless there is some reasonable recognition and fulfilment of mutual obligations.

The principles may seem contradictory, and indeed they were hard to reconcile, but it is also true to say that they were not only held together and constantly reconciled in practice, but also that the political thinkers of the Middle Ages were aware of certain great rational principles which lie behind these conceptions, and in which they found a reasonable reconciliation of them.

For this is the truth about feudalism. At first sight it seems very strange and unintelligible. We find it difficult to understand how men could think and act thus, but if we are a little patient we find it becoming intelligible, and finally we see it not as wholly unnatural and abnormal, but as representing a phase of social and political development which lies indeed behind us, but whose conditions we can understand, and we shall see that in a measure these apparently strange principles have a continuing significance even among ourselves.

The difficulty of understanding feudalism has been immensely increased by the habit of conceiving of it as a homogeneous system, complete and perfect at some definite time and place. It becomes much more intelligible when we begin to see that under the one term there are contained ideas which were very different from each other, and that as it had slowly grown up, so it was perpetually developing and changing. The feudal idea as it is presented to us in the epic or romantic poetry is something quite different from that which is represented by such a characteristic set of law books as those which make up the Assizes of Jerusalem, or by Beaumanoir, and when we look a little more closely we begin to understand this, and to see that the conceptions of the epics and romances of the twelfth and thirteenth centuries represent sometimes the tradition of the past, sometimes an elaborate and artificial convention rather than the actual reality.

There has indeed often been a very serious misunderstanding even among scholars as to the value of the artistic representation of manners and customs. In some poetry, as for instance in the earlier mediaeval epic, the picture of external life and manners of men and women, is highly realistic, and supplies us

with very valuable information as to the conditions of contemporary society. In other forms of literature, and especially in the romance of the twelfth and thirteenth centuries,

it is evident that we are dealing with an art which is in great part, in its relation to the circumstances of life, conventional and traditional, and which even in its essential sentimental or emotional interest represents an abstraction of human life, valuable indeed and profoundly moving and significant, but still an abstraction rather than a realistic treatment. The great fighting man of the epic literature, and the frank, high-hearted, and sometimes implacable woman, upon whom often the whole movement of the story depends, these are real figures of men and women, and they live in the real world. But the romantic hero or heroine, absorbed in their emotions, far removed from the actual circumstances of daily life, are placed in a world which is mainly unreal and conventional. The transition from the *Beowulf* or the Icelandic Sagas to the Arthurian romance is the transition from idealised and heroic reality to an elaborate convention.

It is necessary to use the evidence of mediaeval poetry with great caution, and to make careful distinctions between the value of different forms of it as illustrating the customs and ideas of any one time.

We cannot here attempt to discuss in detail the origin of feudalism, the subject has been handled with great learning by a number of historians,¹ but we can say with great confidence that its origin was extremely complex. *Comitatus*, *Commendatio*, and *Beneficium*, these are the main elements of the relation of lord and vassal, and each of these had an important part in the development of the whole system. From the *Comitatus* there came the devotion of the band of followers to their leader in war, the almost indissoluble tie which united the “companion” to his chief in faith and loyalty, and this may have been the first, as it was certainly among the most important, of the elements out of which the feudal relation grew. It

is this aspect of the relation that we find specially illustrated in the epics and romances, while its influence can also be traced in certain principles of the feudal law books. The process of *Commendatio* by which a hitherto independent person became dependent on some powerful man or ruler in return for the protection that he could afford to him, was probably the means by which the feudal relation was most widely extended. The gradual transformation of a relation, which was originally almost wholly personal, into a great system of land tenure on the basis of military or of “base” service, which in its turn became a system of political relations, this is connected with the *Beneficium*. It is out of these complex and incoherent elements that the feudal system was gradually formed; something of each goes to make up the whole system as we see it from the tenth to the thirteenth centuries, and they are all represented in the literature and legal systems of these times.

It is not necessary to deal at length with the conception of personal loyalty and devotion, it will be sufficient to indicate its nature by means of an example from the literature of the twelfth century.

One of the most interesting illustrations of the influence of the conception is to be found in the French *Chanson de Geste*, the ‘*Raoul de Cambrai*,’ which belongs probably to the latter part of the twelfth century. When Raoul is knighted he takes as his squire Bernier, the illegitimate son of Ybert of Ribemont. Raoul obtains from the King of France a grant of the lands of Vermandois, which had belonged to Ybert’s family, and invades the country in spite of the protests of Bernier. He sacks and burns the town of Origny with its monastery, and Bernier’s mother perishes in the fire. Bernier vows revenge, and joins his father; and, in the battle which follows, kills Raoul. But the significant thing is the

reluctance with which he turns against Raoul; in the first flush of his passion over his mother's death he does indeed refuse all Raoul's attempts to make amends, but afterwards he endeavours to make peace, and when he has given him the fatal wound he weeps and laments that he should have turned against him who had knighted him, and, in spite of his grievous wrongs, he can find no joy in his

vengeance.¹ Through all his life the thought of what he had done haunts him, and there is a tragic fitness in his end, for after many years Raoul's uncle kills him near the place where long before he had killed Raoul.

Nothing can illustrate more vividly the essential character of the traditional feudal conception as it is expressed in the poetry of the Middle Ages. In spite of the dreadful wrongs of which Raoul had been guilty, in spite of his brutal and overbearing character, in spite of the wanton murder of his mother and the other nuns of Origny, Bernier feels that he has committed an unheard-of crime in turning against his lord, to whom he feels himself bound by ties even more sacred than those of nature.²

Illustrations of the personal loyalty and devotion of vassal to lord could be indefinitely multiplied from the mediaeval poets, but no useful purpose would be here served by doing this. Only it is important to remember that they do not represent a principle peculiar to France, but rather a universal and highly significant aspect of the organisation of European society in the Middle Ages. The feudal relation was not one of mere dependence, or of mere advantage, but one of faith and loyal service, and the whole conception is admirably summed up in the famous phrases of the letter of Fulbert of Chartres written in 1020 A.D. to the Duke of Aquitaine. He that swears fidelity to his lord must have in his mind these

six words, "Incolume, tutum, honestum, utile, facile, possibile," he must do what he can to keep his lord's body unharmed, to keep his secrets and strongholds, to maintain his rights of jurisdiction and all his other dignities, to keep his possessions safe, to see that he does not make that difficult or impossible to his lord which is now easy and possible. Fulbert adds that these obligations are mutual, and we shall have more to say upon this point presently.¹

These conceptions were not merely traditional or merely ideal, and we should observe that they have their place also in the more technical expression of feudal principles in the law books, and as late as the thirteenth century.

We have in the Assizes of Jerusalem a very full treatment of the mutual obligation of vassal and lord to which we shall constantly have to recur ; for the moment we can fix our attention on one passage in the work of Jean d'Jbelin, which forms a very important part of the Assizes. In this passage he has described the mutual nature of the obligations of lord and vassal, and then points out that there are some obligations which are peculiar to the vassal. The vassal owes his lord reverence as well as faith, and must do some things for him which the lord is not bound to do. He must be ready to act as a hostage to deliver his lord from prison, and if in battle he sees his lord disarmed and unhorsed he must if necessary give him his own horse in order to enable him to escape from

danger, and again he must be ready to act as security for his lord's debts to the extent of the value of his fief.¹ The lord must indeed in his turn do all that he can to help and deliver his vassal who has thus imperilled himself for him, and to compensate him for the losses he may have suffered ; but there is a real and marked difference in the nature of the obligations, they are indeed mutual, but they are not quite the same, and the element

of reverence, which the vassal owes, is distinctive and important. It is noteworthy that both Glanvill and Bracton, while describing the feudal obligations as mutual, both treat the element of reverence which the vassal owes as distinctive.²

The principle of personal devotion and fidelity to the lord forms, then, a very important part of the tradition of mediaeval society, and we must take careful account of it in trying to estimate the characteristic conceptions of the Middle Ages with respect to the nature of political association. And we must also observe that we have here something quite different from those principles of political relation and obligation which we have so far considered. These sentiments of personal

loyalty must not be confused with the principles of political society either in the form in which they had come down from the ancient world through the Fathers, or as they were implicit in the political structure of the Teutonic societies, so far as we have considered them hitherto. It is no doubt true that in the Teutonic societies, as distinguished from the developed political organisations of the ancient world, there survived traditions and sentiments which were related to the conception of the chieftainship of a tribe, and one of the chief difficulties in dealing with the history of feudalism is to disentangle the tribal from the feudal sentiment. In some mediaeval states, and especially in the German kingdom, the influence of tribal sentiment and tribal loyalty is difficult to measure, and it is probably true to say that the feudal relation only partially overlaid it.

However this may be, these sentiments of personal loyalty and devotion to the immediate lord to whom a man had sworn his faith and service constitute a new element in the tangle of ideas and organisations, out of which there slowly emerged the national state of modern times. And it was an element which was very difficult to reconcile with the national idea and the national constitution. The loyalty of the vassal to his immediate lord was one of the most characteristic elements of the chaos of the tenth century, and it was only very slowly that this loyalty was transferred to the national king.

If we turn back again to the French epics of the Middle Ages we sometimes find that they represent alongside of the profound devotion of the vassal to his immediate lord an almost unmeasured contempt for the king or overlord, and we can find an illustration of this in the same *Chanson de Geste*, the 'Raoul de Cambrai,' which we have already cited. The death of Raoul, which we have already described, is followed by a long conflict between his house and that of Bernier, until, after a long struggle, Gautier, the nephew of Raoul, and Bernier are reconciled with each other. The King of the French is vexed at the reconciliation, and both parties then turn on the King and denounce him as the real author of the feud. When the King threatens to take his father's lands from him,

using many violent words, Bernier flatly defies him, and there follows a long war between the nobles and the King, who is represented throughout as playing a mean but unsuccessful part. The nobles do indeed hold their hand when the King is defeated, because he is their lord, but in the main nothing is more emphatically marked than the difference between the deep sense of obligation and loyalty of the vassals or companions to their immediate lords, and the loose and uncertain deference which they owe to the overlord or King.¹

Enough has been said to indicate the nature of feudalism conceived of as finding its principle in the sense of personal loyalty, of an almost unlimited obligation of the vassal towards his lord. This conception has a place even in the technical legal works of the

Middle Ages, but it is especially emphasised in the poetry, in the epics and romances. It is to a large extent upon this that there has grown up the literary tradition of mediaeval society as based primarily upon the conception of an unswerving loyalty, a romantic personal devotion which overrides all other obligations and principles. But the whole truth is very different from the literary tradition. When we turn from the poetry to the law books we find ourselves in another world, we find a conception of society which is much nearer to the actual conditions and ideals of the Middle Ages.

CHAPTER II.

JUSTICE AND LAW.

WE have dealt with that aspect of feudalism which would seem to present a conception of social or political relations very different from those which we have hitherto considered, and we must recognise that we have here a principle which has exercised and still exercises a great influence in the actual working of political and social relations. When, however, we set out to examine the structure of feudal society more completely, we find that this principle of personal obligation and fidelity is only one of many principles, and that the normal conditions of mediaeval society were not determined by such considerations alone. No doubt the feudal system as a whole did materially affect the development of the method of government in the Middle Ages, but our own impression is that it did not really alter the conception of the nature of political society to the extent which might be supposed, and that in the end its influence was in the main to strengthen the normal tendencies in the development of constitutional order.

There is still a vulgar impression that in the Middle Ages men looked upon authority as irresponsible, that they conceived of the ruler as a person who exercised a capricious and almost unlimited authority over his subjects, and that men had little knowledge of, or care for, any rational principles of social organisation.

We have endeavoured in the first volume to point out how wholly incorrect such an impression proves to be when confronted with the energetic and abundant literature of political thought in the ninth century, and in the last volume we have

dealt with the carefully considered theories of government of the Civilians and Canonists, especially of the twelfth century. It may be imagined that while this is true, the feudal system, in its insistence upon the merely personal element in social relations, had undermined these reasoned judgments, and had diverted the attention of practical men from the consideration of the principles of political order. It is no doubt true that the compilers of the feudal law books were primarily practical men, trying to set down the details of the customs and regulations of mediaeval society, and not theorists in jurisprudence or politics ; but this in some ways only brings into sharper relief the fact that the system which they were describing embodied very important and more or less determinable principles, and that they were in a large measure conscious of these principles and tenacious in maintaining them. As we shall see, so far from its being true that they conceived of authority as something arbitrary and capricious, they conceived of it as a thing very sharply defined and very severely limited. The truth is that the characteristic defect of the system of mediaeval society was not that it left too much liberty for arbitrary and capricious action, but that it tended to fix both rights and obligations to such an extent as to run the risk first of rendering government unworkable, and secondly of rendering the movement and growth of life impossible.

It is of course perfectly true that mediaeval society often seemed to oscillate between an uncontrollable and arbitrary despotism, and an anarchical confusion, but this was due, not to the want of a clear conviction of the rights and duties of rulers and subjects, but to the absence of an effective instrument of government. The history of mediaeval society constantly impresses upon us the conviction that the real difference between a barbarous and a civilised political system lies in the fact that the latter has an almost automatically working administrative and judicial machinery, while the former is dependent upon the chance of the presence of some exceptionally competent and clear-sighted individual ruler.

The truth is that the men of these times were in no way inferior to us in their sense of reverence for law, or in respect

for the great principles of human life, of which law is the embodiment, but that they had no efficient civil service and police to secure the smooth execution of law. They apprehended very clearly the principles of political and social order, but it has taken all these centuries to work out an adequate instrument for giving them practical effect.

To the men of the Middle Ages, as to every serious thinker upon politics, the principle which lies behind every form of the authority of the state is the principle of justice. The justification of authority is that it represents the principle of justice ; the purpose of it is to maintain justice. There is a passage in one of the French epics of the twelfth century which is very characteristic of the temper and judgment of the Middle Ages. The purpose of God, the writer says, in making the king, is not to satisfy his appetite or to enable him to rob the poor, but that he should tread down all wrongs under his feet, and that he should hearken to the complaint of the poor man and do him right.¹

This judgment that authority stands for the maintenance and vindication of righteousness lies behind the whole structure of feudal law. It is admirably expressed in a phrase of the Assizes of the Court of Burgesses of Jerusalem : “La dame ni le sire n’en est seignor se non dou dreit,” and “ mais bien sachi^s qu’il n’est mie seignor de faire tort.”² The authority of the lady or lord is only an authority to do law or justice—for the phrase implies both—they have no authority to behave unjustly. Here is a great principle stated with a certain epigrammatic force. It is true that this principle was not novel, but corresponds with the traditions of the Roman and Canon law, and no doubt arose directly out of

those political principles of the Teutonic societies which we have already considered, as they are expressed in the writers of the ninth century.¹ But, though the principle was traditional, the whole contents of the Assizes show very clearly that it was no merely formal tradition, but rather that the organisation of such a typical feudal state as the kingdom of Jerusalem represented the effort to secure its reality.

It is worth our while to consider the character of the whole passage from which these words are taken. If any man or woman, knight or burgess, has obtained a judgment of the court, and the king or queen endeavours to prevent its execution, this is a sin against God and their oath. For the king has sworn to maintain the good usages and customs of the kingdom, to protect the poor as well as the rich in the enjoyment of their rights, if he now breaks his oath he denies God, and his men and the people should not permit this, for “ la dame ni le sire n’en est seignor se non dou dreit.”²

Here is indeed an admirable summary of the principles of government, and of the relations of rulers and subjects ; we shall presently consider this more closely under the

terms of the place of law in the political principles of feudalism, but in the meanwhile it is important to observe how clear

and well defined is the general conception of the nature of political authority. The feudal lawyers do not generally discuss abstract principles, but it is easy to see that behind the detail of regulations there lay the assumption that these represented some principles of what was reasonable and equitable, that political authority represented moral and religious as well as purely legal obligations.

Some of the law books, and especially the Assizes of the Court of Burgesses, were strongly influenced by the revived study of the Roman law, and in these we find a more definite attempt to deal with the abstract nature of justice. These Assizes begin with a paraphrase of the first title of the Institutes of Justinian, and it is interesting to see how the compiler blends religious and legal conceptions to express his meaning.¹

The whole conception of the feudal lawyers is summed up in a very important and significant passage in Bracton's treatise on the laws of England. The king, he says, must, at his coronation, swear three things—first, that he will do what lies in him to secure that the Church and all Christian people may have peace in his time; secondly, that he will forbid rapine and wrong-doing among all classes of the people; thirdly, that in all his judgments he will ordain equity and mercy as he hopes for mercy from God. The king is indeed elected for this very purpose, that he should do justice to all men, and that through him God may distribute His judgments, for it would be useless to make laws if there were not some one to enforce them. The king is God's vicar upon earth, and it is his duty to

divide right from wrong, the equitable from the inequitable, that all his subjects may live honestly, and that no man should injure another.

In power, indeed, he should excel all his subjects, for he should have no equal nor superior, specially in administering justice. For the king, inasmuch as he is God's vicar and servant, can do nothing except that which he can do lawfully. It is indeed said that what pleases the prince has the force of law, but at the end of this law there follow the words, "*cum lege regia, quae de imperio lata est,*" &c., that is, not everything is law which may be thought to be his will, but only that which is determined upon with the intention of making laws, with the authority of the king, with the counsel of his magistrates, and after due deliberation and discussion.

The authority of the king is the authority of law (or right), not of wrong. The king, therefore, should use the authority of law (or right) as being the vicar and servant of God on earth, for that alone is the authority of God; the authority of wrong belongs to the devil, and not to God, and the king is the servant of him whose work he does. Therefore when the king does justice he is the vicar of the eternal King, but the servant of the devil when he turns aside to do wrong. For the king has his title from the fact that he governs well, and not from the fact that he reigns, for he is a king when he governs well, but a tyrant when he oppresses the people entrusted to him. Let him therefore restrain his authority by the law, which is the bridle of authority, let him live according to law, for this is the principle of human law that laws bind him who makes them, as it is said, "*digna vox maiestate regnantis est legibus se alligatum principem proleteri,*" and again, "*Nihil tarn proprium est imperii, quam legibus vivere,*" and "*maius imperio est legibus submittere principatum,*" and "*merito debet retribuere legi, quia lex tribuit ei, facit enim lex quod ipse sit rex.*"¹

Bracton's words are an admirable summary of the principle that all authority represents some essential principle of justice and equity, that an unjust authority is no authority. We shall frequently have occasion to refer to this passage, for it contains much which requires comment. It is obvious that his phrases represent many influences besides that of feudal tradition and custom, he is well acquainted with some important passages in the Roman law, either by direct knowledge of the *Corpus Juris*, or through the intermediary of great civilians like Azo, and he is also much influenced by certain aspects of the patristic tradition, and especially by reminiscences of St Isidore of Seville. But his position is fundamentally that of all feudal law ; whatever may have been the importance of the principle of personal loyalty and devotion in mediaeval society, it was no part of the thought or feeling of serious and practical men that these obligations were independent of reason and justice.

No doubt the adjustment of these principles to each other has always proved and will always prove difficult, and, as we shall see, a good deal of the complexity of feudal law arises from the difficulty of finding an adjustment of traditional sentiments with the practical needs of an organised and civilised community, but this had to be effected, and it was found in the gradual transference of the conception of loyalty from the individual lord to the nation and its head.

“La dame ni le sire n'en est seignor se non don dreit.” Here is the whole principle of government in a phrase, but the phrase itself suggests to us that this is not a merely abstract principle, that the conception of right or justice is not a merely abstract principle but that it had also a practical embodiment. To the mediaeval mind the law was the practical form of justice, and it is in the due maintenance of law that men found the security for justice and for all good in life. There is an excellent statement of this conception in the prologue to one of the Norman law books, the ‘*Summa de Legibus*,’ which is thought to belong to the middle of the thirteenth century. The author looks upon law as created in order to restrain men's unbridled desires and the conflicts which these would cause if unchecked ; it is God, the lover of justice, who has created princes in order that they may restrain the discord of men by definite laws.¹

To the feudalist, indeed, law is in such a sense the foundation of authority, that where there is no law there is no authority. In the terms of a famous phrase of Bracton, “There is no king where will rules and not law.”

Bracton is indeed careful to maintain that all men are under the king, while he is under no man, but only under God ; but he is under the law, for the law makes the king. And he is under the law precisely because he is God's vicar, for Jesus Christ whom he represents upon earth willed to be under the law that he might redeem those who were under the law ; and thus the blessed Virgin Mary, the mother of the Lord, did not refuse to submit herself to the ordinances of the law. The king should do likewise, lest his authority should be unrestrained ; there is no one greater than the king in administering justice, but he should be as the least in receiving the judgment of the law.¹

We shall have to recur to this passage, and to deal with some sentences which follow those we have here cited, as well as

with other passages related to this matter. In the meanwhile it is sufficient to observe the emphatic assertion that kingship is impossible without law, and that the king is not only under God but also under the law. It may perhaps be suggested that the evidence of Bracton as to the principles of feudalism cannot be accepted without much caution, for

his work belongs to that time when feudal relations were giving way before national. Caution is no doubt necessary, but in this case we need have no scruple in taking Bracton's phrases as representative of the general system of feudal law, for these are precisely the principles which are set out in all the earlier feudal law books.

It is this principle which is emphatically expressed in the forms attendant on the coronation of the mediaeval king. We have in the first volume dealt at some length with the great significance of the coronation oath in the earlier mediaeval societies ; ¹ it was equally important in the feudal State. Jean d'Ibelin describes at length the circumstances attendant on the succession to the kingdom of Jerusalem. The king is to swear that he will help the Patriarch of Jerusalem and protect the liberties of the Church, that he will do justice to widows and orphans, that he will maintain the ancient customs and assizes of the kingdom, and that he will keep all the Christian people of the kingdom according to their ancient and approved customs, and according to the assizes of his predecessors in their rights and "justises," as a Christian king and a faithful servant of God ought to do. And what the king swears all the men of the kingdom are also to swear, that they will hold and maintain the good usages and customs of the kingdom.²

This principle of the loyal observance of the law is well expressed in another place where Jean d'Ibelin says that the kings and nobles of Jerusalem should be wise, loyal, and good administrators of justice: they must be loyal, for they must loyally keep and govern themselves and their people, and must not do or suffer to be done disloyalty or falsehood ; they must be good administrators of justice, for they must uphold the rights of every man in their several courts and lordships.¹

The same principle is again tersely expressed in one of the Norman law books. When the Duke of Normandy is received as Duke he must swear to serve the Church of God, and to keep good peace and justice according to law ; ² and again, in the most important of the feudal law books of Germany, the 'Sachsenspiegel,' when the king is elected he is to swear to uphold the law of the kingdom, according to his power.³

We have already dealt with the important passage in which Bracton sets out the same principle in relation to the coronation oath of the King of England,⁴ and Bracton is only commenting on the immemorial customs attendant on English coronations, customs which had not been in any way interrupted by the Norman Conquest.

CHAPTER III.

THE SOURCE OF LAW.

THE law is then to the feudal jurist the expression of the principle of justice, and it is supreme in the state, the king himself is the servant of the law.

What is then the source of law, what is the authority which it represents ? It is here perhaps that it is most difficult for the modern to understand the Middle Ages, while it is to the failure to do this that we may attribute most of the mistakes which have been made with regard to the nature of the mediaeval State and the conception of government in the Middle Ages.

Above all things we must, if we are to make our way at all, discard the common conception of sovereignty, the conception that a law represents the mere command of a law giver, or even of a community. This conception, whose value in regard to modern times we cannot here discuss, is wholly foreign to the Middle Ages. To them the law was not primarily something made or created at all, but something which existed as a part of the national or local life. The law was primarily custom, legislative acts were not expressions

of will, but records or promulgations of that which was recognised as already binding upon men. The conception of legislation had perhaps already appeared in the ninth century, but if so it had in the main died out again in the tenth and eleventh.¹

Bracton, indeed, in a well-known passage based on Glanvill, claims that while other countries use "leges" and "jus scriptum," England alone uses unwritten law and custom.¹ His phrase probably is related to the fact that there were people in some parts of Europe who lived under Roman law, and possibly to the great development of the influence of the Roman jurisprudence since the rise of the law school of Bologna in the twelfth century. While, however, we can in part explain Bracton's saying, and while it was no doubt correct about England, it is a curiously inaccurate view of the nature of law in the other European countries.

If we turn from Bracton to his great contemporary, Beaumanoir, in France, we find that he asserts boldly that all pleas are determined according to custom, and that the great feudatories like the Count of Clermont, and even the King of France himself, are bound to keep them, and cause them to be kept; and Beaumanoir states the two tests by which it can be determined whether a custom is legally binding. The first is that the custom is general, and has been observed without dispute as far as man's memory goes, the second is that there has been a dispute about the matter and that there has been a judgment of the Court about it.²

Perhaps, however, the most illuminating view of the place of custom in mediaeval law may be found in the account of the origin of the Assizes of Jerusalem which is given by Jean d'Ibelin and Philip of Novara. The story is historically very improbable,¹ but it is none the less important for us, for it represents in a very vivid fashion the conceptions of these jurists. Jean d'Ibelin tells us that when Godfrey of Bouillon had been elected as head of the newly conquered state of Jerusalem, he, with the advice of the Patriarch and princes and barons, and the wisest men whom he could find, appointed a certain number of wise men to inquire of those who were in Jerusalem what were the customs of their various countries, and to put these into writing. When this had been done the collection was brought before Godfrey and the Patriarch and notables, and he then with their counsel and consent selected such of the customs as seemed good to him, and made Assizes and usages, by which he and all the people of the kingdom were to be governed.² He relates further how the Kings of Jerusalem with the same advice and consent added from time to time other Assizes and altered the old ones, after inquiring from those who came to the Holy Land about their customs and usages, and how several times the Kings of Jerusalem sent to other countries to inquire directly about their customs.³

We have here a very suggestive account of what these jurists looked upon as a great legislative action. The circumstances indeed were unparalleled in mediaeval history, for the Kingdom of Jerusalem represented the establishment of a Western and Christian state in an alien and infidel country, while the Crusaders were not a homogeneous body, but were drawn from many different Western countries. They were therefore, as the authors of the Assizes thought, compelled to create a system of law for themselves, to proceed to a large and comprehensive effort of legislation. It is the more significant that in doing this they, according to the tradition, endeavoured scrupulously to ascertain the customary laws of the various national societies from which the Crusaders came, and formed their own laws by a process of selection and conflation from them.

The whole story illustrates very vividly the fact that the mediaeval conception of law was dominated by custom, for even when the jurists thought that the Crusaders had to legislate for a new political society, they conceive of them as doing this by the process of collecting existing customs, only selecting and modifying as far as was necessary to bring them into some sort of harmony with each other. The Assizes of Jerusalem were, in their estimation, primarily written customs. And it is of interest to observe that when, as they thought, the great compilation was lost, when Saladin conquered Jerusalem, and when therefore they could no longer consult the text of the written customs, they at once fell back upon the unwritten customs and the decisions of the courts.¹

We have so far been dealing with the Assizes of the High Court of Jerusalem, but there has also come down to us a collection of the Assizes of the Court of Burgesses. It is noticeable that these are influenced in a high degree by the *Corpus Juris Civilis* : no doubt this seems to indicate that the population of the towns was drawn in large measure from those countries like the south of France, and some parts of Italy, in which there were many who lived under Itoman law. Our text of these Assizes dates from a much earlier time than the works of Jean d'Ibelin and Philip of Novara, it is indeed generally thought to belong to some time between 1173 and 1180. It is not quite clear whether the statement of Jean d'Ibelin with regard to the origin of the Assizes of the High Court refers to them also, but there seems no substantial reason to doubt it. It is also deserving of notice that there was established in Jerusalem a court for the native Syrian population, and that this administered a justice based upon their own customs.¹

The first element in the conception of feudal law is that it is custom, that it is something not made by the king or even by the community, but something which is a part of its life. We can, however, see that at least as early as the thirteenth century there began to reappear the conception of laws as being made, not that the idea of custom as law disappears, but that there gradually grew up alongside of this the conception that laws could be made under certain conditions and by suitable authority. It is difficult to say how far the development of this was due to the pressure of circumstances compelling men deliberately to make new laws, or to modify old ones, how far it may have been facilitated by the revived and extended study of the Roman jurisprudence, and by the systematic development of the Canon law, which in this matter represents the same principles as the Roman law, and was indeed no doubt greatly influenced by it. Whatever may have been the circumstances which produced this great change, it is of the first importance in the history of political theory to observe the fact of the change.

We have here arrived at the beginnings of the modern conception of sovereignty, that is, of the conception that there is in every independent society the power of making and unmaking laws, some final authority which knows no legal limits, and from which there is no legal appeal. We cannot here consider how far, and in what sense, this conception was present to the political thinkers of the ancient world. Still less can we here consider what is the real character of the modern theory, how far indeed it has been thought out completely and adequately, how far it still represents a somewhat crude and inorganic conception of society, a somewhat crude and partial apprehension of certain elements in the nature of the state.

It is at any rate quite certain that the modern conception as a whole was not only unknown to the Middle Ages, but that it would have been to them almost unintelligible. For to them the law of any particular state represented, in the first place, the customs of the community, which had not been made, but were part of the life of the community; and, in the second place, so far as they reflected upon the principles which lay behind these customs, they conceived of them as related to and determined by the rule of justice; and, if and so far as they went further, they conceived of the law of the state as subservient to the natural law and the law of God.

It remains true that at least in the thirteenth century the conception of definite legislative action begins to appear, and we must therefore now consider the terms or forms of this legislative action as it is presented to us by the feudal jurists.

We begin with a phrase of Glanvill which bears upon its face the influence of the revival of Roman law, and which is yet also clearly mediaeval in its principle. The laws of England, he says, though unwritten, may properly be called “ laws,” for the law says that whatever the Prince pleases has the force of law; that is, we may properly call these “ laws ” which have been promulgated on doubtful matters with the counsel of the chief men and the authority of the prince.¹ We may put beside this some sentences from the Norman ‘ *Summa de legibus* ’ of the middle of the thirteenth century. “ *Consuetudines* ” are customs observed from ancient times, approved by the prince, and maintained by the people, which

determine to whom any thing belongs. Laws (*leges*) are institutions made by the prince and maintained by the people of the province, by which every dispute is decided. And again, laws and institutions were made by the Norman princes with great industry, by the counsel and consent of the prelates, counts, barons, and other prudent men, for the wellbeing of the human race.¹

In these passages the conception of the authority of law is related first to custom, but the writers are aware that there are forms of law which have an immediate origin of a different kind, which have been made after due deliberation. The force of these laws is derived from the authority of the prince, the counsel and consent of the great men, and the observation, or reception, or maintenance of them by the people : it is difficult to find an exact rendering for the phrase “ *a populo conservati*.”

This conception of law is characteristic of the whole mediaeval tradition. It is for the prince or king to issue or promulgate laws, and without his authority this cannot be done ; but to make his action legitimate he must consult the great and wise men of the nation ; and the people or whole community has its place, for they have to receive or observe the law. This is the conception which we find in the political writers and in the legislative documents of the ninth century,² and it is evident that it continued to be the conception of the feudal lawyers of the twelfth and thirteenth centuries. It may have some relation to the definition of law by Papinian.³ It is possible that the terms of the phrases which describe the part of the people in legislation may be related to the principle laid down by Gratian, that no law is valid, by whomsoever promulgated, unless it is accepted by the custom of those concerned.¹ A similar doctrine was held by some at least of the civilians of the twelfth and thirteenth centuries.²

The same principles, again, are stated by Bracton in the passage of which we have already cited the first words. While in almost all other countries men follow the laws

(leges) and a written “jus,” England alone uses not written law but custom ; it is not, however, absurd to call the English laws “leges,” for that has the force of law (legis) which has been justly determined and approved, with the counsel and consent of the great men, the approval (sponsione) of the whole commonwealth and the authority of the king. And again, in another place, he says, that such English laws and customs, by the king’s authority, sometimes command, sometimes forbid, and sometimes punish transgressors, and inasmuch as they have been approved by the consent of those who are concerned with them (utentium), and confirmed by the oath of the king, they cannot be changed or abolished without the common consent of all those by whose counsel or consent they were promulgated, although they may be improved (in melius converti) even without this consent, for to improve is not to destroy.³

There is one great feudal lawyer whose position requires some special examination, and that is Beaumanoir. For his phrases are, at least at first sight, a little ambiguous. In some

passages he would seem to say simply that the king is the legislator, and if this stood alone, we might conclude that to him the authority of law was derived simply from the king’s will. It is indeed possible that Beaumanoir represents some tendency which was peculiar to the French monarchy, and it is more than probable that his conceptions of the nature of the power of monarchy were strongly influenced by the revived study of the Civil law, and its conception of the legislative authority of the Emperor, and we might therefore incline to the conclusion that his position was different from that of the feudal lawyers whose principles we have so far examined. In order then that we may rightly estimate his position we must examine briefly his conception of the origin of kingship.

In an important passage, which we shall have to consider again later, Beaumanoir says that in the beginning all men were free, and of the same freedom, for we all are descended from one common parent, but as the number of men increased strife arose, and those who desired to live in peace recognised that this was impossible while every man thought himself as good as others. They therefore elected a king, and made him head over them, and gave him power to judge their misdeeds, and to make commandments and “establissemens” over them.¹ The phrases of the passage suggest very strongly the influence of the Roman jurisprudence ; the conception of the original equality of men, the appearance of war and its consequent confusions and crimes, the conception of the people creating a king and giving him authority to make laws, these may have come directly to Beaumanoir by many channels, but it is at least very probable that they represent the traditions of the Institutes and Digest.²

The phrases are remarkable both for their democratic conception of human nature, and of the source of authority, and for their sharply marked conception of the legislative power of the king, and if they stood alone we might have to conclude that Beaumanoir’s theory of the nature of law was different from that which we have so far seen to be characteristic of the feudal jurists. But the phrases do not stand alone, and in order to form a complete judgment upon his theory we must examine some other passages in his work. The first is one in which Beaumanoir is careful to point out that while every baron is “souverain” in his own barony, the king is “souverain” in all the kingdom, and has thus the general care of the whole kingdom, and therefore he can make such “establissemens” as he thinks well for the common good.¹ The words represent an important development of the conception of the national monarchy, and they attribute the supreme legislative power to

the king ; but it should be noticed that he holds the power because he is responsible for the care of the whole kingdom, and exercises it not for his own ends, but for the common good. The last phrase is important, and is constantly repeated, the legislative power must be used for the common good.²

In other passages we find, however, phrases which add another principle to these. The king may make “ *establissemens* ” only for his own domain, and in this case they do not concern his barons, who must continue to administer their lands according to the ancient customs. When, however, the “ *establissemens* ” are general, they are in force throughout the kingdom. But such “ *establissemens* ” are made “ *par tres grant conseil*,” and for the common good.¹ Again, in another place ; the king may indeed make new “ *establissemens*,” but he must take great care that he makes them for reasonable cause, for the common good, and “ *par grant conseil*.”²

Beaumanoir does not anywhere explain what precisely he means by the words “ *par grant conseil* ” ; but it would seem most natural to understand them as referring to the need of consultation with some body of persons qualified to advise the king. We must then at least correct our first impression of Beaumanoir’s theory of legislation. He would seem to place the royal authority in a more isolated position than is general in the feudal jurists, he may be more influenced than they are in general by the newly recovered conception of the legislative power of the emperor in the Roman law, and may possibly, though on this we can express no opinion, represent some conception of monarchy which was developing specially in France at that time. But, on the other hand, in his insistence upon the need of reasonable cause, on the “ *grant conseil*,” and on the principle that legislation must be for the common good, he comes very near to the general principles of the other feudalists.⁸

We are therefore justified in the conclusion that the feudal conception of law is first that of custom ; and secondly, that so far as men began to recognise the necessity of actual legislative action, they conceived of the law as deriving its authority not from the will or command of the ruler alone, but also from the counsel and consent of the great or wise men, and the assent of the whole community.

CHAPTER IV.

THE MAINTENANCE OF LAW.

THE feudal jurists held clearly and maintained emphatically that the relations of men to each other are determined by the principles of justice, that the law is the form and expression of justice, and that it is in the strict observance of the law that men find the security for the maintenance of justice. The principle is clear, but it may be said that this was little more than formal, that the king might indeed swear to administer justice and to maintain the law, but there was no method by which this obligation could be enforced. How far this was from being true we shall see as we examine more closely the principles of the structure of feudal society.

We shall do well to remind ourselves of a very noticeable phrase in that passage in the Assizes of the Court of Burgesses of Jerusalem which we have already quoted. If the lord should break his oath and refuse to minister law and justice to his people, they are not to permit this.¹ This is a blunt expression of the principle which underlies the structure of feudal society, and the relations of lord and vassal. But feudal law did more than recognise the principle, it provided a carefully constructed machinery for carrying it out.

We must turn from the principle of the supremacy of law to the method of its determination and enforcement. That is, we must examine the nature of the feudal court, and the relation of lord and vassal to this, and we begin by examining these questions as they are presented in the

Assizes of Jerusalem. Jean d'Ibelin draws out with great care the nature of the mutual obligations of lord and vassal. He expresses in the highest terms the fidelity which the vassal owes to his lord, the service and help which he must render to him, the secrecy which he must maintain about his counsels, and the respect which he owes to his wife and daughter,¹ and he enumerates those distinctive obligations which the vassal owes to his lord, which we have already mentioned,² but at the same time he insists that the lord is bound to his vassal by the same faith which the vassal owes to him, and that he may not touch his vassal's body or his fief except by the judgment of the court.³

These are the principles of the relation between lord and vassal, but they are not mere abstract principles, they are legally enforceable. If the vassal fails to discharge his obligations, and the lord can establish this by the judgment of the court, the vassal will lose his fief, and the lord can treat him as a traitor, and as one who has broken his faith.⁴ On the other hand, if the lord breaks his faith to the vassal, the vassal can bring the matter before the court, and if the court decides in his favour, it will declare him to be free from his obligations, and he will hold his fief without service for his lifetime.

Neither lord nor vassal can take the matter into his own hands, but must submit his complaint to the court, and abide by its judgment.¹ It is the court which is the judge in all cases of dispute about the relative rights or duties of lord and vassal.

It is thus important to ask what was the composition of the feudal court. It was the court of the lord, and one might naturally enough think that it was the lord who decided the matters brought before it. But this was not the case ; the court was composed in principle of all the vassals, and the judgment of the court was the judgment of its members. It was even by some disputed whether the lord was properly speaking a member of the court at all. Jean d'Ibelin's work contains a very interesting and significant discussion of this subject. He is dealing with the question how a man is to claim a fief which he, or his ancestors, have held, and says that the man is to appear before the lord and say by his advocate that he, or his ancestors, have held the fief, and that if the lord doubts this he is prepared to prove it " *par le recort de partie des homes de vostre court.*" The lord may reply that proof must be " *par privilege ou par recort de court,*" and that proof " *par la recort de partie des homes de la court* " is not valid, for there could be no court unless the lord himself or his representative were present. To this the vassal replies that on the contrary the lord may not sit in the court, " *as esgars ne as conoissance ne h recors que il font* " ; the vassals are to sit without the lord, and when they have arrived at their decision, it is to be reported to the lord as the judgment of the court. Jean d'Ibelin does not formally pronounce a judgment upon the whole question, but he is clear that the presence of the lord is not necessary to constitute a proper court, at least in cases concerning claims

to the tenure of a fief.¹ In another passage he describes the proper procedure of the court when the king or his representative is not present.² The court, then, whose duty it is to enforce upon lord and vassal alike the due observance of these obligations, is indeed the court of the lord, but its judgment is the common judgment of all those concerned.

It may, however, be urged that this is very well in principle, but what sanction could there be for such a comprehensive control over lord and vassal, what power was there which could enforce the observation of the decisions of the court. This question may seem to us, from our modern standpoint, one of great difficulty, but the compilers of the Assizes of Jerusalem had what seemed to them a perfectly simple and clear answer.

The matter is dealt with both by Jean d'lbelin and by Philip of Novara, but the treatment of the latter is the more complete. He has set out, in a passage to which we shall have to return later, the relation of the overlord to the sub-vassals, as declared in an Assize of King Amauri, and then explains the position of the mesne vassals in case of dispute between them and the overlord. The king, he says, recognised, when the Assize was established, that all his liegemen, whether they held of him immediately, or of his vassals, were bound in faith to each other, and could demand aid each of all the others,¹ and he draws out the significance of this in detail. If a vassal makes some claim upon his lord and demands that the matter should be brought before the lord's court and the lord refuses, the vassal may call upon all his peers to go to the lord and demand that he should allow the matter to be brought before the court. If the lord refuse to listen to them, they must declare to the lord that they will discharge none of their obligation to him till he has done this. And thus also if the case has been brought before the court and the lord refuses to carry out its judgment, the vassals are to renounce their service to him until this has been done. And again, if the lord or his representative should deprive a man of his fief without judgment of the court, the vassal's peers are to help him and give him force to recover his fief. And Philip adds that he remembered that when the representative of the Emperor (Frederick II.) deprived the lord of Beyrouth and his nephews of their fiefs, this assize was cited in the court, and the court recognised it as valid.¹

Jean d'lbelin maintains the same principles, and it is worth while to notice the emphatic phrases he uses with respect to the case of a lord putting his vassal in prison without the judgment of the court. In such a case his friends and relations may summon all his peers to accompany them to the lord, and to demand his release or the judgment of the court. If the lord, refuses, they are to rescue their peer by force, unless the lord resists in person ; in that case, as they cannot bear arms against him, they are each and all to renounce all service to him till he has set their peer at liberty, or has submitted the case to the judgment of the court.¹

The principle of the authority of the court in enforcing their mutual obligations upon lord or vassal is to the compilers of the Assizes of Jerusalem perfectly clear and obvious, and the whole body of the vassals is bound to maintain this authority even against the lord. This is perhaps even more clearly brought out by Jean d'lbelin in another passage, in which he maintains that if the court has given a judgment against the lord in the case of a man who is not a vassal, and the lord refuses to carry this out, such a man may lay the matter before the vassals and adjure them to compel the lord to carry out the judgment. The vassals are then to go to their lord and request him to do this, and if he refuses they are to declare to him that they are bound to maintain the honour of the court and the Assizes of the Kingdom of Jerusalem, and that they will renounce all service to him until he has carried out the judgment of the court.²

This was then the method by which the authority of the laws and customs of Jerusalem was to be declared and enforced. The court was the supreme judge, and the lord, that is, the King of Jerusalem, had to submit to it; if he refused to do this the ordinary relations between him and his vassals were for the time suspended, and they were to renounce all their service to him until he submitted to the court and its judgments.¹ The compilers of the Assizes justify their opinion by citing two cases in which, as they say, the vassals of the kingdom of Jerusalem had taken such action.²

It may perhaps be urged that the Assizes of Jerusalem represent an extreme and even fantastic development of the principle of the obligation of the king or lord to govern according to law, and that their principle of the supremacy of the court over the king or lord was eccentric and unparalleled. It is indeed true that in their detail they represent a particular and local attempt to create a method of control over the ruler, a method which, however good it may seem in theory, was not likely to produce an effective system of government; and we cannot look upon this method as being more than one of the many experiments in government which were being made in the twelfth and thirteenth centuries. But we are in this work concerned rather with the principle which lay behind such experiments than with the experiments themselves. If we are content to consider them from this standpoint we shall find these experiments immensely interesting, and shall also find that these principles are reflected more or less clearly and completely in many at least of the feudal law books.

In those compilations of the feudal law of Lombardy which are known to us as the ‘*Consuetudines Feudorum*,’ and which belong substantially to the twelfth century, the principles of the relation of lord and vassal are set out with great clearness. The obligations of the vassal must be discharged by him, and if he refuse or fails to carry them out, he will lose his fief.¹ On the other hand, it is laid down with great emphasis that no vassal can be deprived of his benefice except for a definite and proved offence.² And it is very clearly maintained that in all cases of dispute about the fief and its tenure between the lord and vassal there is always a proper tribunal to decide, and this tribunal is either the court which is composed of the peers of the vassal or the court of the Emperor.³ It is noteworthy that the lord has only the same remedy against his vassal as the vassal against him, that is, the appeal to the court, and that the court is, if need be, to compel the lord to make restitution to his vassal or to submit himself to the judgment of the court. If the lord should refuse to do this the vassal can carry the case to the higher authority, that is, clearly to the overlord or Emperor.⁴

The ‘*Sachsenspiegel*,’ the most important German handbook of feudal law, which was written before 1232, does not describe in detail like the Assizes of Jerusalem the organisation of the feudal court and the method of securing its authority in enforcing the mutual obligations of lord and vassal, but it contains two very significant passages which are related to the position of the vassal and the control of the king.

In the first of these it says that a man may without violation of his fidelity wound or even slay his lord, or the lord the man, if this is done in self-defence.¹ In the second it lays down the principle that the man who feels himself injured by the “*richtere*” can appeal to the *Schultheiss*, and that also the Count Palatine is judge over the Emperor.²

The work entitled ‘*Le Conseil de Pierre de Fontaines*’ belongs probably to about the year 1253, when its author was Bailli of the Vermandois. Its intention, according to the author, was to record the customs of the Vermandois, and other lay courts,³ but it consists

very largely of citations from the Code and Digest of Justinian, and it has been suggested that it is really a fragment of a French “ Summa ” of the Code.⁴ The author assumes that a vassal has the right to implead his lord in the lord’s court, that is, that the court has authority to judge between the lord and the vassal, but he limits the right to questions concerning the fief and injuries inflicted upon the vassal concerning this.¹

In the compilation known as the ‘ Etablissements de St Louis,’ we have a more complete treatment of the relations of lord and vassal, which with some important modifications represents the same principles as those of the Assizes of Jerusalem. In the first place, it is very clearly laid down that the obligations of lord and vassal are mutual and must be observed with equal care by both. The vassal who transgresses against this, and is guilty of various offences against his lord, will justly lose his fief ; ² but then, with equal clearness, it is laid down that if the lord refuses his vassal the judgment of his court, or if he seduces his wife or daughter, then the vassal will be free from his obligation to him and will hold his fief from the overlord.³

Again we find in the Etablissements the same principle as that of the Assizes of Jerusalem, that in cases in the king’s court on any matter concerning a vassal’s inheritance, the decision belongs not to the king personally, but to the court including the vassal’s peers.¹ The Etablissements do not indeed contain the same elaborate machinery for the enforcement of the judgments of the court as do the Assizes, but the compiler did not scruple to maintain that in the last resort the vassal, if the King of France refuses to do him justice in his court, has the right to make war upon him, and is entitled to summon his sub-vassals to follow him. Before they obey the summons they must indeed first go to the king and ask whether it was true that he had refused their lord the judgment of the court; if the king denied this and said that he was willing to discharge his lawful obligations, they can refuse to follow their lord, but if his complaint proved to be true, they must then follow him to war, even against the king.²

If we now turn to the greatest of the French feudal lawyers, that is to Beaumanoir, we find that his conceptions of the relation of lord and vassal, while they differ in detail, are substantially the same as those which we have hitherto considered. In the first place, he sets out very clearly the principle that the obligations of lord and vassal are mutual, as the vassal owes faith and loyalty to his lord, so also the lord owes these to the vassal, and the penalty for a violation of these obligations is the same, in extreme cases the lord will forfeit the homage of his vassal, just as the vassal will lose his fief.¹

In the next place, Beaumanoir lays down as clearly as the other feudal lawyers that these reciprocal obligations are protected by a suitable judicial machinery. In cases of dispute between the whole body of the vassals and their lord, Beaumanoir holds that the court of vassals cannot be judge, as they are all parties to the dispute, but they should demand justice of the lord and his council, and if the lord refuses this they should go to the king, as overlord. In the case, however, of a dispute between a single vassal and the lord, the case is decided by the court of the vassal’s peers.² There is always a court which is competent to decide upon disputes as to feudal duties and rights, and this court is in the first place the court of the lord, but the judgment in the court belongs to the vassals. Until the vassal has demanded justice in the court he cannot appeal to the overlord, and Beaumanoir mentions a famous case of his time in which the

men of Ghent had tried to bring a case against their lord, the Count of Flanders, before the King of France ; their suit was refused on the ground that they had not first taken the case to the court of the Count of Flanders.¹

The important matter is that the feudal court is not one in which the judgment is dependent upon the caprice or selfinterest of the lord, but one in which, as it administers the custom and law of the district or country, so also the decisions are given by all those who are concerned to maintain them. The true character of the court is well brought out when Beaumanoir says in another place that when a lord brings a case in his court against one of his vassals he can take no part in considering what should be the judgment of the court, it is the vassals who determine this ; if the lord is dissatisfied with the judgment he can appeal against it, and the appeal goes to the court of the overlord. Beaumanoir seems to maintain that in the Beauvoisis the lord was in no case a judge in his own court, but only the vassals.² We have dealt with the discussion of the place of the lord in his court in the Assizes of Jerusalem,³ it is very important to compare with this the opinion of a jurist of the caution and sagacity of Beaumanoir. Finally, it should be observed that Beaumanoir holds that in the last resort a vassal who feels himself wronged by his lord can renounce his homage and his fief and challenge his lord, and in the same way the lord can renounce his right to homage and can then challenge his vassal.¹

The great English jurist Bracton, as we have already seen, lays down the general principles of the relation of authority to justice, and to law as the embodiment of justice, in broader terms than any of the other lawyers whose work we have been considering. His work also illustrates very specially a movement of mediaeval society which we have not yet had the opportunity to consider, that is, the gradual supersession of the feudal system of government by that of the national monarchy.

We have already noticed his statement of the reciprocal nature of feudal obligations.² Disputes about these are decided in the court of the lord, and if that does not do justice the case is to be taken to the county court, and finally, if the king consents, can be taken to the “ great court.”³ We have here the same principles as those which we have already considered, with the important modification that the case is to be taken from the court of the lord to the county court, not to a feudal court.

It is, however, in his treatment of the relation of the king to the law that Bracton is most interesting. We have already cited some of the most important passages in which he sets out what he considered the most essential principles of king- ship, and the relation of the king to justice and law. We must now consider some aspects of these in detail.¹

There is no king, Bracton says, where there is no law,² and the phrase has an immense constitutional and philosophical breadth, and warns us how short-sighted is the judgment of those who imagine that the Middle Ages had no philosophical conception of the State. For here we have no mere isolated phrase, but the summary expression of a principle which is illustrated in the whole constitutional structure of mediaeval society, and not least in its feudal aspect. Where there is no law there is no king, and the king is under God and the law, for it is the law which makes the king.³ The phrase may possibly be influenced by a reminiscence of the words of Theodosius and Valentinian in the ‘ Code,’ “ our authority depends upon the authority of law,”⁴ but the phrase is not the less remarkable, for Bracton, who is constantly influenced by the Roman jurisprudence, must

have been aware that the Roman law books also contained the doctrine that the emperor was “*legibus solutus*,”⁵ and he selects from the Itoman tradition that which suits his purpose.

The king is under the law, and is to obey the law himself. The king is indeed the minister and vicar of God, but this is only a further reason why he should obey the law, for being God’s minister his authority is only that of law (right), not of wrong (*iniurioe*), for this only is the authority which comes from God, the authority of wrong (*iniurice*) is of the devil, and the king is the servant of him whose works he does—the vicar of God when he does justice, the minister of the devil when he does wrong.¹ Just so far as the king is to be the vicar of God he must follow the example of Jesus Christ and the blessed Virgin, who submitted themselves to the law.² It is very significant that Bracton—while maintaining in its highest form the conception of the divine authority of the ruler, as we have just seen, he calls him the vicar of God—should use this not as an argument for an unlimited and uncontrolled authority, but rather as an additional reason for maintaining that the king is under the law, and must govern according to law. Bracton does not hesitate to call the law “*fraenum potentiae*,” the bridle of power.³

And now lest we should imagine that this means little, because the king is himself the source and author of law, Bracton is careful to warn us against a perversion of the doctrine of the Roman jurisprudence. He was familiar with Ulpian’s phrase that the will of the prince has the force of law

and evidently felt that this might mislead men, and he therefore lays it down that not everything which it may be thought that the king wills has the force of law, but only that which is promulgated by the king’s authority, with the counsel of his great men, and after due deliberation.¹ Again, in other passages which we have already quoted,² in which he sets out the great importance of unwritten and customary law in England, he says that it is reasonable to call the English laws, though unwritten, “*laws*,” for that has the force of law which is set out and approved with the counsel and consent of the great men, and the general approval of the commonwealth, by the authority of the king.³

And again, when these laws have been approved by the custom of those concerned, and by the oath of the king, they cannot be abrogated or changed without the consent of all those by whose counsel and consent they were made.⁴ The law is not something which the king makes or unmakes at his pleasure, but rather represents an authority which even the king cannot override.

The king is indeed the supreme administrator of law, and Bracton uses strong phrases to describe the need of submission to his authority ; but here we come upon a somewhat difficult question of interpretation. We have, in the first place, several passages which seem to state very emphatically that the king has no superior, and that no one can judge his actions. In the first of these Bracton, after enumerating the various classes or orders of men in the State, says that all are under the king, and he is under no man, but only under God ; he has no equal in his kingdom, much less a superior ; the king must be under no man, but only under God and the law, for it is the law which makes him king.¹ In another passage it is said that no one can dispute the king’s charters, nor his actions, not even the “*justiciary*,” nor can any one interpret them except himself,² and this corresponds with another passage in which it is said that a complaint against the king can only be made by way of supplication to him, for no writ runs against

the king, and if he will not correct or amend what is complained of, he must be left to the judgment of God.³

So far we have apparently clear statements of the position of Bracton, but the matter is not as clear as it looks. The last passage cited begins with the words, “ non debet esse maior eo in regno suo in exhibitione iuris, minimus autem esse debet, vel quasi, in iudicio suscipiendo, si petat,” and the same principle is set out in a passage in a later Book, “ licet in iustitia recipi- enda minimo de regno suo comparetur.”¹ We have just cited the words which immediately precede this. The king should have no equal, much less a superior, especially in administering justice, but in receiving justice he is like the humblest in his kingdom.

In another passage Bracton, in discussing the question against whom the Assize of Novel Disseisin may be demanded, says that this cannot be claimed against the king or prince or other person who has no superior but God ; in such a case there is place only for supplication that he should amend his action, and if he will not do this he must be left to the judgment of God, who says “ Vengeance is mine, and I will repay.” But then, with a sudden turn of thought, Bracton adds that some may say that in such a case the “ universitas regni ” and the “ baronagium ” may and should correct and amend the king’s action in the king’s court (Curia).²

And this brings us to a passage which seems, at first sight at least, wholly inconsistent with the conception of the position of the king presented in those passages which we first cited. We have just considered the first part of this passage, in which it is laid down that no one may dispute the king’s charters or acts, but it continues in a different strain. The king has a superior, that is God, and the law by which he is made king ; and also he has his court, namely counts and barons, for counts are so called as being the king’s associates, and he who has an associate has a master; if therefore the king should be without a bridle, that is without law, they should impose a bridle upon him.¹

It is certainly difficult to reconcile this statement with those in other passages which we have already considered, in which it is said very emphatically that the king is under no man, that he has no equal or superior, except God and the law.² It seems most probable that the passage has been interpolated into the text of Bracton’s work ;³ but while it is difficult to think that Bracton would himself have used these terms, it is not clear whether he would have repudiated the substance of them. It is true that in the passages which we have just cited he says that if the king refuses to do justice, he must be left to the judgment of God,⁴ but against this must be set the phrase “ minimus autem esse debet, vel quasi, in iudicio suscipiendo, si petat,”¹ the more general but very emphatic statement that the king is under the law,² and the reference to the possibility that the “ Universitas Itegni ” and the “ Baronagium ” may correct the king’s unjust action.³ It should also be observed that in a passage which also we have already cited, Bracton describes the king as the vicar of God if he does justice, but the minister of the devil if he turns to injustice, and he uses phrases, derived in part from St Isidore of Seville, that the title of king is derived from good ruling, not from mere reigning, for he is a king while he rules well, but a tyrant when he oppresses the people which is entrusted to him.⁴ It is indeed impossible to say with absolute confidence what Bracton may have implied in using the designation “ tyrant ” of the unjust king, but it must be borne in mind that in the common usage of mediaeval writers this is generally

employed to describe a ruler who either never had, or had ceased to have, any claim on the obedience of his subjects.⁶

We are, however, not so much concerned with the question whether the words represent the opinion of Bracton, or of some other contemporary writer. There seems to be no reason to think that the words, although interpolated, belong to a later time. They are important to us on account of their correspondence with the principles of other feudal jurists. The principle which they represent is the principle of some of the most important of these. The Assizes of Jerusalem set out very clearly that the king is subject to the law, and that the court is the tribunal to which any one who feels himself aggrieved by the king or lord can appeal, that it is responsible for the maintenance of the law, if necessary even against the king, and they cite cases in which this principle had been carried out in action.⁶ The * *Sachsenspiegel* ' seems definitely to lay down the doctrine that even the king is answerable to one who can judge him.¹ The ' *Etablissements of St Louis* ' are clear that even in the case of the King of France the vassal can demand justice of him in his Court, and that if the king refuses to give this he can make war upon the king, and can require his sub-vassals to follow him.² And though Beaumanoir does not commit himself to any definite statement about the coercion of the king, he does emphatically set out the general principle of the supremacy of the court as determining the mutual obligation of lord and vassal.³

It is, we think, clear that the feudal system was in its essence a system of contractual relations, and that the contract was binding upon both parties, on the lord as much as on the vassal. Whatever else may be said about it, one thing is clear, and that is that feudalism represents the antithesis to the conception of an autocratic or absolute government.

CHAPTER V.

FEUDALISM AND THE NATION.

It may be urged that the tendency of feudalism was really anarchical and disintegrating, that it tended to arrest or retard the development of the conception of the national society or state, that the principle of the loyalty which the vassal owed to his immediate lord was really inconsistent with the conception of the authority of the whole community and its head. There is a great amount of truth in such a contention, and we must therefore consider the matter in some detail, but briefly.

In an earlier chapter attention has been drawn to the contrast, which finds expression in some of the epic poetry, between the personal loyalty and devotion which the vassal owes to his immediate lord and the indifference and even contempt for the overlord or king.¹ There is no doubt that we have here a forcible expression of an anti-national and disintegrating character in feudalism. The truth is that the feudal system, whatever may have been its remoter origins, took shape during those years when the dissolution of the Carolingian empire and the invasions of the Northmen and Magyars reduced Europe to an extreme confusion, and that its characteristics are related to the absence of such a well-organised government as might give the private man adequate protection. In the absence of strong central or national authorities, men had to turn for protection to the nearest power which seemed to be capable of rendering this. At the same time all those jurisdictions, which had once represented the delegated authority of the Carolingian emperors and kings, tended to become heredi

tary. When Europe began to recover from the anarchical confusions of the late ninth century and the early tenth century, the new conditions were firmly established, and the great national organisations which gradually formed themselves out of the ruins of the Carolingian empire were at first rather groups of semi-independent territories or states than compacted administrative unities. It would be outside of our province to examine the varieties of these conditions as they present themselves to us in Germany or Italy, in France or England. We must bear in mind that the conditions varied greatly in detail; it is enough for our purpose to recognise that in spite of these variations the conditions were substantially similar.

It was the characteristic of feudal society that the local and personal attachments were strong, while the relations to the central authorities were comparatively weak and fluctuating. This is the fact which lies behind the weakness of the overlord or king and the power of the immediate lord. The great feudatories no doubt owed allegiance to the king or emperor, but the vassals of the great feudatories had at first probably no very clearly defined relations to the overlord. We have now to recognise that while this was true, and while in Germany the process of national consolidation was overpowered by the territorial principle, in England and France, and ultimately in the other European states, the national unity triumphed over these disintegrating forces. The truth is that while feudalism was based primarily upon the relations between a man and his immediate lord, the principle of the national state was, though undeveloped, older, and soon began to reassert itself, so that at least as early as the eleventh and twelfth centuries the principle of a direct relation between all free men and the king began to be firmly established. Students of English constitutional history will remember the significance of the action of William the Conqueror in requiring all landowners to take the oath of fidelity to himself, whosoever men they were.¹ We have now to observe that this principle is embodied in the feudal law books of the twelfth and thirteenth centuries.

Jean d'Ibelin makes it clear that in the kingdom of Jerusalem it was established as law after the war between Amauri I. and Girard of Seeste (Sidon) that the sub-vassals as well as the tenants-in-chief had to take the oath of allegiance (*ligece*) to the chief lord, the king, and that he could require the inhabitants of cities and castles held by his vassals to swear fealty to himself.¹ In another passage he lays it down that when any man does homage in the kingdom of Jerusalem to any one else than the chief lord he must not do "*ligece*," for no one can do "*ligece*" to more than one man, and all the vassals of the vassals are bound to do "*ligece*" to the chief lord of the kingdom.² In another place again he describes the mode in which the sub-vassal makes allegiance to the chief lord of the kingdom; he is to kneel and, placing his hands between those of the chief lord, is to say, "Sire, I make you allegiance (*ligece*) according to the Assize for such and such a fief, which I hold of such and such a person, and promise to guard and protect you against any who may live or die, as I am bound to do by the allegiance (*ligece*) made according to the Assize." The chief lord kisses him and replies, "And I receive you in the faith of God and in my own, as I ought to do in accordance with the allegiance (*ligece*) made according to the Assize." When they have thus made allegiance the sub-vassals are bound to defend and support the chief lord against every one, and even against their immediate lord under certain conditions. If the chief lord has a dispute or war with any one of their lords, the sub-vassals are to remind their lord that they are the liegemen of the chief lord, and to request him to demand that the dispute should be submitted to the

judgment of the court. If the chief lord refuses to do justice in his court, they will follow their lord, but if he refuses to take these steps within forty days, or if within that time he takes action against the chief lord, they will forsake him and support the chief lord.¹ Again, Jean d'Ibelin says that if any lord is doing wrong to the chief lord, without his knowledge, the sub-vassals must remonstrate with their lord, and if necessary must join the chief lord against him.¹ Again, the close relation between the chief lord and the sub-vassal is illustrated by the principle that the chief lord is bound to protect him against his immediate lord, if he acts unjustly and without the authority of his court, and to replace him in his fief if he has been unjustly deprived of it.² These principles are stated in much the same terms also by Philip of Novara.³

It is clear therefore that even in a typical feudal constitution such as that of the kingdom of Jerusalem in the twelfth century, the principle of the supremacy of the central or national organisation over the relations between the vassal and his immediate lord was already fully recognised. It is perhaps scarcely necessary to point out that this principle is clearly set out in Glanvill with regard to England in the twelfth century, but it is worth while to notice that he makes a distinction between the homage which a man may make to different lords for different fiefs, and the liege obligation (*ligancia*) which he can only make to that lord from whom he holds his "*capitale tenementum*." The distinction is not the same as that in the Assizes of Jerusalem, but it is parallel to it. Glanvill makes it clear that in doing homage to any lord, there must always be reserved the faith which he owes to the king, and that the sub-vassal must follow the king even against his lord.⁴

If we turn to France we find the principle of the reservation of fidelity to the king is clearly stated in the thirteenth century by the author of the '*Jostice et Piet.*' The king, he says, must hold of no one: dukes, counts, &c., may hold of each other, and become each other's men, but always, saving the dignity of the king, against whom no homage is of any authority. "*Chastelain*," "*vavasor*," citizens and villains are under others, but all are under the king.¹ Again, Beaumanoir sets out very distinctly the principle that the obligation of the vassal to follow his lord in battle does not extend to the case when the vassal is called upon to follow against the overlord or the king.²

The only writer in whom we have found some suggestion of ambiguity about the matter is one of the Lombard civilians of the thirteenth century, who also wrote on feudal law, James of Ardizzone. He seems indeed to agree himself with the jurists already cited that the sub-vassal is not bound to follow his feudal superior against the overlord, and that he is rather to be rewarded if he refuses to follow his lord against the "*prince*" and the "*patria*," for every man is bound to defend the "*patria*," and the "*prince*" is to be preferred to every other creature; but he mentions, apparently as a view which was maintained by some, that a vassal is bound to help his lord against another superior, and is not to be punished for this. The phrase is indeed ambiguous, but it leaves upon one's mind the impression that the "*alter superior*" is his lord's superior.³ It is easy to recognise that the question here raised was a difficult one, and that it would arise specially under Italian conditions; but it is important to observe that even in Italy the principle of the reservation of fidelity to the overlord, or to the prince, was very

definitely maintained. We must, however, allow for the great influence which the Roman jurisprudence would exercise upon the judgment of James of Ardizzone.

There is indeed no doubt that in the judgment of the feudal jurists of the thirteenth century the king has a full jurisdiction over all persons within his kingdom.

The author of the 'Sachsenspiegel' lays down this doctrine with great clearness and emphasis. The king, he says, is the common (ordinary) judge over all men. Every man has his right (law) before the king, all authority is delegated by him. Whenever and wherever the king is himself present all other jurisdictions are superseded, and all prisoners must be brought before him, any person refusing to do this will be put under the ban, and any man who is aggrieved by a judgment can appeal to the king.¹ These phrases are very comprehensive in

their nature, and, while this is not the place to discuss their actual constitutional significance in the administration and judicial organisation of the empire, they are yet of great importance as indicating how far at least in theory the national conception had imposed itself upon the feudal.

The same principle is set out in the 'Summa de legibus,' one of the Norman law books of the thirteenth century. The prince alone has "plena iurisdictio" over all disputes brought to him,¹ and again in another place, the jurisdiction of the feudal lord is severely limited to certain cases, for all "ius-ticiatio personarum" belongs in Normandy to the Duke, in virtue of the fealty which all men owe to him; and again, jurisdiction over the bodies of all men, small or great, belongs in Normandy to the Duke, inasmuch as they are bound by fidelity and allegiance to him alone.²

The author of the 'Jostice et Piet,' and Beaumanoir, maintain the same doctrine in France. The author of 'Jostice et Piet' is indeed so much influenced by the Roman law that it may be held that he is to be considered rather as a civilian than a feudalism, but his treatment of the subject corresponds in principle with that of the feudal jurists. His phrases are noteworthy. The king has jurisdiction everywhere and always, he has plenary authority in everything, while others have it only in part.¹ Again, the count or duke has "jostice" in his lands, but under the king who is over him, the king must not indeed deprive him of this, so long as he does right, but the king can interfere to secure justice. The king holds of no one; dukes, counts, viscounts, and barons can hold of each other, and become each other's men, but always, saving the dignity of the king, against whom homage is of no avail, for all are under the hand of the king.²

Beaumanoir asserts very emphatically that the king is supreme over all jurisdictions and over all persons. In one passage of great importance which we have already discussed he explains the sense in which he uses the word "souverain," and says that while every baron is "souverain" in his own barony, the king is "souverain" over all, and has the charge of the whole kingdom, and therefore can make "establissemens" which are binding everywhere. No one is so great that he cannot be called before the king's court, "pour defaute de droit on pour faus jugement."¹

The whole conception is summed up by Bracton in an emphatic passage in which he lays down the principle that the king has the "ordinary" jurisdiction and authority over all men who are in the kingdom, for all laws which belong to the crown and the lay authority and the temporal sword are in his hand; it is he who holds justice and judgment, that is jurisdiction, so that it is by his jurisdiction, as being the minister and vicar of God, that he gives to every man that which is to be his.¹

When we now endeavour to sum up the conclusions which arise from the study of the political theory of the feudal law books, it is evident that they represent very different principles from those which have been sometimes thought of as related to feudalism. The conception of personal devotion and loyalty, of an almost unquestioning obedience and fidelity of the vassal towards his lord, was no doubt of great importance, and the conception has left deeply marked traces in the structure and the sentiments of European political society. But it is also clear that the principle of loyalty did not, in the minds of the feudal lawyers, or, as we shall see further in the second part of the volume, in the judgment of mediaeval society in general, override other considerations of an ideal and rational kind. The feudal jurists recognised very clearly that all human relations, and not least the relations of lord and vassal, must be controlled by the principles of equity and justice, and that these principles found their embodiment in the law—the law which is the superior of kings and princes, which is the expression not of their will merely, but of justice, and of the custom and consent of the community. It is clear that the feudal jurists conceived of the relations of vassal and lord as being limited and determined by the law, that lord and vassal were equally obliged to obey and to maintain the law, which prescribed the nature and extent of their mutual obligations. The relation of lord and vassal was a contractual relation, the terms of the contract were prescribed by law, and the obligation of the contract was determined by law.

Again, we have seen that while feudalism, in its great development in the tenth century, was the result of the operation of forces which were anarchical, or which at least tended to disintegrate the larger political organisations of Western Europe, these tendencies were rapidly checked by the growth of the principle that the feudal jurisdictions were subject to the control of the rising national systems, and that beyond the obligations of the vassal to his immediate lord every individual free man owed allegiance to the national sovereign. We have considered the history of this movement as it is reflected in the feudal law books themselves, and have seen that at least as early as the twelfth and thirteenth centuries it was recognised that the royal or national authority was paramount over all other authorities.

It is no doubt true that feudalism left for many centuries deep traces in the structure of Western society, and even on the theory of political relations, but it is also true that, when we consider the subject in the broadest way, feudalism did not counteract the normal development of the political ideas of Western civilisation, but rather that in the end its main influence went to further the growth of the principle that the community is governed by law, and that the ruler as much as the subject is bound to obey the law.

PART II.

GENERAL POLITICAL THEORY IN THE ELEVENTH AND TWELFTH CENTURIES.



CHAPTER I.

NATURAL LAW AND EQUALITY.

WE now turn to the history of the general development of political ideas from the beginning of the tenth century to the end of the twelfth, that is, we can resume the history of these conceptions at the point where we left them in our first volume. We shall in doing this have occasion from time to time to take account of the influence of the three systems of law which we have considered, the feudal, the civil, and the canon law, but our main task is to trace this development in the general literature of those times, and in the

principles expressed or implicit in the constitutional development of Europe. For the time being we shall not discuss directly the questions concerned with the relations of the temporal and spiritual powers. These became during this period so important that we propose to devote a separate volume to them.

In considering the theories of the civilians and canonists we have seen how important was the conception of natural law in the Middle Ages, but we must not look for any detailed discussion of this in the literature which we have now to examine, for these writers were for the most part engaged in considering the principles of political society as they emerged in the actual

controversies and conflicts of this time. On the other hand, there is enough to show us that so far as they reflected upon the matter they all thought under the terms of the contrast between the natural and conventional condition.

This is specially clear in regard to the conception of human nature and its “natural” characteristics. We are apt to think of mediæval society as governed by the idea of distinctions of blood and birth, and these conceptions were not wholly unimportant. It is, however, clear that, so far as men reflected upon the matter, they accepted the tradition of the later philosophical system of the ancient world, and of Christianity as handed down by the Christian Fathers and by the civil law, that there are no “natural” distinctions in human nature, and that all differences of rank and condition are conventional or “positive.”

We have dealt with the subject as it is illustrated in the writings of the civilians and canonists in the second volume,¹ and we only therefore add one citation from an ecclesiastical writer. It is, however, specially significant to observe how emphatically the conception of the natural freedom of men is stated by some of the feudal lawyers.

In the tenth century, in a work of that strange and eccentric prelate, Eatherius, Bishop of Verona, we find a passage in which he urges upon Christian men that they should remember that God made all men equal in nature, and that it is quite possible that the subject may be a better man than his lord. The man who boasts of his noble blood should remember that we are all of one origin and are made of the same substance. In Christ we are all one, redeemed with the same price, reborn in the same baptism, and those who rend asunder the unity of the brotherhood by setting themselves over others are really denying the common fatherhood and redemption of men. In the sight of God we are only distinguished from each other so far as our actions are better; the man who humbly serves is better than the man who arrogantly despises his fellowmen, he is nobler who observes the law of nature and does not repudiate his true origin, than he who violates that friendship between men which is so great and natural a good.¹

The passage is no doubt based mainly upon recollections of earlier writers, of the Fathers, and, probably through them, of Stoic writers like Seneca,² but it is representative of the normal judgment of mediæval thinkers.

We may take as our first illustration from the feudal lawyers a very notable passage in the ‘Sachsenspiegel.’ God, says the author, made all men in His own likeness, and redeemed man by His passion, the poor as well as the rich; there were no slaves when the forefathers of the Germans first settled in the land; slavery, or serfdom, began by violence and capture and unrighteous force; the law of Moses required all slaves to be set

free in the seventh year; and the author holds that it is not in accordance with the truth or the will of God that one man should belong to another.³

We may put beside these phrases a passage from Beaumanoir in which he sets out the same principles, but in different terms. All men, he says, were at the beginning free, and of the same freedom, for all men are descended from one father and mother ; slavery (or serfdom) arose in many ways, such as that men were taken prisoners in war, or sold themselves into slavery on account of their poverty, or because they could not defend themselves against the unjust violence of lords; however men may have become slaves it is a great act of charity that a lord should set his slaves (or serfs) free, for it is a great evil that Christian men should be in the servile condition.¹

It is clear that even the feudal lawyers were profoundly affected by the earlier traditions, and that to them just as much as to the Christian fathers the subjection of man to man as slave or villein was a thing conventional, not natural.

CHAPTER II.

THE DIVINE ORIGIN AND NATURE OF POLITICAL AUTHORITY.

IN the first volume of this work we have examined the characteristic elements of the theory of the origin and nature of political authority as it is set out in the literature of the ninth century, and we think that enough has been said to make it clear that as soon as we find any literary treatment of political conditions and ideas, we find that there were very clearly fixed in the minds of the men of the new mediaeval civilisation some highly important conceptions of political origins and obligations. We have in the last volume endeavoured to examine the relation of the revived Roman law, and of the new system of Ecclesiastical law, to these conceptions, and in the first part of this volume we have considered the bearing upon them of Feudalism. We must now inquire how far these conceptions can be said to have been continuously present to men's minds in the centuries from the tenth to the twelfth, and how far they were modified or developed.

We are entering upon the study of an age in which the structure of society was very rapidly growing and changing, and we have to inquire how far and in what manner men's conceptions of the principles of the political order changed with it. If our interpretation of the political theory of the ninth century is at all correct, the main features of that theory are to be found in three principles—first, that all authority, whether Temporal or Spiritual, is ultimately derived from God ; second, that the supreme authority in political society is that of the law, the law which represents the principle of justice; and third, that the immediate source of all political authority is the community, for law is primarily the custom of the community, and there can be no legitimate authority without the election or recognition of the community. We have to inquire how far these principles continued to control the conception of political society, and in what manner they were modified or developed.

During the tenth century and the earlier part of the eleventh we should infer, from the fragments of the literature which have survived, that there was not very much active political speculation ; we can indeed gather from occasional phrases the general nature of the conceptions which were current, but it may be doubted whether men did generally do much more than repeat the commonplaces of the ninth century tradition. These commonplaces were not, however, unimportant, and in some respects they seem to represent real and intimate convictions.

It was the great constitutional and ecclesiastical conflicts of the latter part of the eleventh century, continued in the twelfth, which compelled men to consider these traditional presuppositions more closely, and from the middle of the eleventh century we have an abundant and important body of literature in which we can discern with great clearness the main features of an energetic and determined political speculation.

We must begin by considering the question how far in the period with which we are now dealing it was doubted or denied that the secular authority was derived from God, and this will lead us on to the closely related question whether the State was or was not conceived of as having a moral function and purpose.

As we have seen, the principles of the divine source of political authority, and of the moral function of government, were most emphatically laid down by the Fathers,¹ and maintained by the writers of the ninth century.² It has been suggested that these conceptions were really undermined by the influence of St Augustine, especially as expressed in the 'De Civitate Dei,' and that the effects of St Augustine's mode of thought are clearly traceable in the Middle Ages. We cannot here discuss the real and complete meaning of St Augustine, the subject has been handled with great care and restraint by Reuter.¹ The question with which we have to deal is whether there was among the political theorists of the eleventh or twelfth centuries any important tendency to think of the secular power as lacking the divine authority, and as representing a principle of evil rather than of good.

The discussion centres round some phrases of Pope Gregory VII. (Hildebrand), their meaning and their influence. Some writers have attached a very great importance to these, and have considered them to be representative of a clear and dogmatic theory, which as they have thought was of great importance in the Middle Ages. And no doubt Hildebrand's phrases are emphatic and startling. The best known of them is to be found in his famous letter to Hermann, the Bishop of Metz (1081) : " Quis nesciat: reges et duces ab iis habuisse principium, qui, Deum ignorantes, superbia, rapinis, perfidia, homicidiis, postremo universis pene sceleribus, mundi principe diabolo videlicet agitante, super pares, scilicet homines, dominari caeca cupidine et intolerabili praesumptione affectaverunt." ² Beside these words we may put those of an earlier letter written to the same Bishop (1076) : " Sed forte putant, quod regia dignitas episcopalem praecellat. Ex earum principiis colligere possunt, quantum a se utraque differunt. Illam quidem superbia humana repperit, banc divina pietas instituit. Hanc vanam gloriam incessanter captat, haec ad coelestem vitam semper aspirat." ³ These are indeed strong phrases, and might well, to the unwary, seem to imply a definite doctrine of the secular power, as representing not the authority of God, but of evil.

In order, however, to arrive at the meaning of Hildebrand's phrases, we must begin by observing that in other places he speaks of the secular power in very different terms. In a letter written to Rudolph, Duke of Suabia, in 1073, he speaks of his hope that the " sacerdotium " and the " imperium " may be united in concord, that, as the human body is ruled by its two eyes, so the body of the Church may be ruled and enlightened when the two authorities agree in the true religion.¹ In a letter of 1074 to Henry IV., he bids him to know that he rightly holds the royal power, if he obeys Christ the King of Kings and defends and restores the Church.² In a letter to Sweyn, King of Denmark, in 1075, he prays him to administer the authority entrusted to him, according to God, to adorn the dignity of the royal title with the

appropriate virtues, and to make it manifest that that justice, in virtue of which he reigned over his subjects, also ruled in his heart.³ Again, in writing to Harold, King of Denmark, in 1077, he admonishes him to keep the honour of the kingdom committed to him by God with all diligence, and to make his life worthy of it, in wisdom, justice, and mercy, that God may be able to say of him, “By me this King reigneth.”⁴ And again, in writing to Olaf, King of Norway, in 1078, he describes the true function of his royal authority as being to help the oppressed, to defend the widow, and to love and defend justice with all his might.⁶

Perhaps the most notable passage is contained in a letter in which Hildebrand urged upon William the Conqueror, in 1080, the duty of obedience to the papal authority, inasmuch as the Pope would have to give account to God for him in the day of judgment; he prefaced this exhortation to obedience by a very explicit statement that God had appointed two authorities greater than all others to rule the world, the apostolical and the royal.¹

It is clear that if we are to arrive at a complete and just view of the conception of kingship and secular authority held by Hildebrand, we must not isolate the phrases of the two letters to Hermann of Metz, but must consider them along with the sentiments he expresses at other times. If, then, we examine the circumstances under which the two letters to Hermann were written, we find that the purpose of both was to refute the arguments of those who maintained that it was not lawful or proper for the Pope or any one else to excommunicate the king or emperor. Hildebrand was primarily concerned to demonstrate the absurdity of this view, and he justifies his action by three considerations—first, the general authority of binding and loosing given by Christ to Peter, from which no one is exempt; second, the precedents which he cites of such excommunications of kings in the past; and third, by a comparison of the dignity and authority of the temporal and spiritual powers. It is in this last connection that he discusses the origin of secular authority, and urges that this had its origin in the sinful ambition and love of power of men who desired to make themselves the masters of their equals. That is, Hildebrand in these phrases maintains that the origin of secular authority is related to the vicious or sinful character in human nature.

We have then here one aspect of Hildebrand's conception of the nature of secular authority, stated sharply and without qualification, but in a context which is highly controversial. In the other passages which have been cited we have a very different view. In these he describes secular authority as being derived from God, and as finding its true character in the defence and maintenance of justice, and he hopes that there may be a true concord and agreement between the “sacerdotium” and the “imperium,” the two authorities which God has appointed to rule over the world.

These two conceptions may seem at first sight, especially to those who are unfamiliar with the Stoic and Patristic tradition, inconsistent and irreconcilable, but this is merely a confusion. For, in this tradition, government, like the other great institutions of society, such as property and slavery, is the result of sin, and represents sinful greed and ambition, and yet is also the necessary, and, in the Christian conception, the divine, remedy for sin. Men in a state of innocence would neither need coercive government, nor would they claim to rule over their fellow-men; while in the state of sin and ambition, men desire lordship over each other, but also, in this condition, men need control and restraint if any measure of justice and peace is to be attained and preserved. And thus

the institution of government, which is the result of men's sinful passions, is also appointed by God to restrain sin.¹

No doubt the phrases of Hildebrand in the two letters to the Bishop of Metz express one side of the traditional theory in a very harsh and crude fashion, and we have evidence that

they were resented even among those who were not prepared to defend the investiture of bishops with ring and staff by the secular authorities. For instance, Hugh of Fleury, in a treatise addressed to Henry I. of England in the early years of the twelfth century, protests indignantly against the phrases which had been used by Hildebrand in these letters about the origin and character of the royal authority, and maintains that such opinions are absurd, and contrary to the apostolic doctrine that all authority is from God, and that there is a divine hierarchy of authority and obedience not only on earth, but also in heaven.¹

The phrases of Hildebrand were resented, and, considering their highly controversial context, this is not surprising. Is there now any reason to think that the conception which is expressed in these phrases was maintained by other writers of this period as representing a complete and exclusive theory of the origin and nature of temporal authority * There are a very few passages in the contemporary literature which deserve our attention.

In a fragmentary treatise written in the middle of the eleventh century by a French churchman attacking the action of the Emperor Henry III. with regard to the Papacy, especially no doubt in view of the deposition of the Popes at the Council of Sutri, the author severely condemns the emperor as having claimed jurisdiction over the Pope, and urges that the emperor does not occupy the place of Christ, but that it might rather be said that he holds that of the devil, when he uses the sword and sheds blood.¹

Again, in a treatise written by a certain Bernald, apparently in the last years of the eleventh century, he urges that if the Popes have authority to depose Patriarchs, they have the same authority over secular princes whose dignity seems to have been created rather by men than by the divine institution.² Cardinal Deusdedit, in one of his treatises, speaks of the royal authority as arising from human institution, with the permission indeed of God, but not by His will, and he refers to the demand of the Israelites for a king, as related in 1 Samuel.³

The first of these passages is very drastic, and if we had any reason to think that it represented a generally current view, would have considerable significance ; but as we shall see presently, some of the strongest papalists take the very opposite view of the use of the temporal sword.⁴ The phrases of Bernald and of Deusdedit do not represent anything more than the conception that the temporal power is not derived immediately from God, but is directly the creation of human will and authority.

What was, then, the normal view of these centuries as to the source and nature of secular authority ? There can really be no doubt whatever about this to those who are at the pains to make themselves familiar with the literature of those times. The writers of these centuries are practically unanimous in maintaining that the authority of the king or emperor is derived from God. The principle is clearly expressed by those who wrote before the development of the great conflict between the Papacy and the Empire in the latter part of the eleventh century, but

we also find it maintained with equal clearness during the great conflict both by imperialists and papalists.

In a commentary by Bishop Atto of Vercelli, which belongs to the second half of the tenth century, we find a very interesting and very emphatic statement of the divine authority of the secular ruler, whether he was Christian or pagan.¹ Again, in a report of the sermon of the Archbishop of Mainz at the coronation of Conrad the Salic, which Wippo gives in his life of Conrad, the Archbishop is represented as referring to the same phrases of St Paul, and as speaking of God as the source of all human dignity, who had appointed Conrad to be king over his people ; the king is the vicar of Christ.² The same conception is maintained by Peter Damian, one of the most illustrious of the reforming Italian churchmen of the middle of the eleventh century. In a letter to Archbishop Anno of Cologne, he speaks of the “ regnum ” and “ sacerdotium ” as being both derived from God, and of the need which each has of the other.¹ In another place he draws out in some detail the complementary relation between the spiritual and the temporal authorities. The duties of the different members of the Church, for they are both within the Church, are not the same. The duty of the priest is to nourish and cherish all in mercy, the duty of the judge is to punish the guilty, to deliver the innocent from the power of the wicked, to be diligent in carrying out the law, and in maintaining equity ; he should always remember the words of the apostle, “ Wouldest thou have no fear of the power ? do that which is good, and thou shalt have praise of him, for he is God’s minister to thee for good. But if thou doest evil, be afraid ; for he beareth not the sword in vain ” (Rom. xiii. 3, 4).² Peter Damian is clear that the authority of the secular power in administering justice and punishing crime is derived from God.

The writers whom we have just cited belong to the period before the great conflict had broken out, but the same principle is maintained by writers of all shades of opinion during the great struggle. It is needless to cite the declarations of the extreme imperialist writers, for this principle is one of the main foundations of their argument against the papalists, and we shall presently have to consider some of their phrases in detail, when we discuss the conclusions which some of them wished to draw from this principle.

It is, however, very important to observe that this principle was held with equal firmness by writers who did not belong to the imperialist party, and even by the extremest papalists. Gerhoh of Reichersberg, one of the most important writers of the middle of the twelfth century, was certainly no partisan of the secular party, rather, vehemently maintained the liberty and authority of the Church, but he was also very clear in asserting the divine origin and authority of the secular power. In one of his treatises he condemns in the strongest terms any attempt of the ecclesiastic to draw to himself the secular authority, on the ground that this would be to destroy the authority which had been set up by God Himself.¹ Again, no writer of the Middle Ages is clearer than John of Salisbury as to the limits and conditions of the royal authority, and the right of resistance to the tyrant, but he is equally clear that the authority of the prince comes from God, and has the divine sanction.²

We shall presently have occasion to examine in detail the political theory of Manegold of Lautenbach, the most incisive writer of the investiture controversy, and the most unsparing critic in the Middle Ages of what he conceived to be the illegitimate

pretensions of the imperialists. While, however, he emphatically repudiates what he held to be the false interpretation of the apostolic doctrine of the divine nature of secular authority, he traces this error to a confusion between the office of the king, which he evidently conceives to be sacred, and the position of an individual king who may have justly forfeited his authority, and cannot then claim obedience in the name of the apostolic authority.¹ And again in another passage he quotes with approbation a sentence from a letter of Pope Innocent I., which asserted that the exercise of criminal justice by the secular power was founded upon the authority of God Himself.²

And again the same principle is maintained by Honorius Augustodunensis. In his treatise entitled 'Summa Gloria,' which is in the main a vindication of the greater dignity of

the spiritual as compared with the temporal authority, he held indeed that the authority of man over man was not primitive, but established to restrain men's sinful passions, but he is also clear that it was established by God.¹ And in another chapter of the same work he sets this out with great emphasis. The royal authority is indeed inferior in dignity to the priestly, but the royal authority must, in those matters which belong to it, be obeyed, not only by the laity, but by the clergy ; and he quotes St Peter and St Paul as teaching plainly that it was instituted by God for the punishment of the wicked and the reward of the good.²

There can really be no doubt whatever as to the normal conceptions of the political theorists of the eleventh and twelfth centuries as to the origin and nature of the temporal power. The phrases of Gregory VII. in his letter to Hermann of Metz are no doubt at first sight startling, and it is not surprising that they have led to some misunderstanding, but it is clear that they only represent one aspect of his own conception of the state, and that an examination of his correspondence makes it clear that he had no intention to deny that political authority was derived from God. And we hope that it is now evident that the political theorists of all schools of thought recognised that, if man in a state of innocence would have needed no coercive authority, man under the actual conditions of human nature requires such an authority both for the suppression of wrong and injustice and for the maintenance of righteousness.

CHAPTER III.

THE MORAL FUNCTION OF POLITICAL AUTHORITY.

THE normal conception of the Middle Ages was then that the temporal as well as the spiritual power derives its authority from God. We must now observe that this principle found its rationale in the moral purpose or end of temporal authority. Such occasional and controversial phrases as those of Hildebrand might leave the impression that secular authority had no other purpose than to minister to the ambitions and to satisfy the desires of the ruler. But this was very far from being the real principle of the Middle Ages ; to these the authority of the king or emperor was divine, because it was his function to secure the establishment and maintenance of justice.

It is true that St Augustine had entangled himself in a position which in some places at least led him to deny that the state must find its essential and distinguishing quality in justice.¹ There is no trace of this conception in the writers of the tenth, eleventh, and twelfth centuries ; the passages in St Augustine's writings which support it are not, as far as we have seen, ever quoted. On the contrary, the constant principle set out by the mediaeval writers is that the maintenance of justice is the essential function of the ruler.

We can find this represented first in some references to the beginnings of organised society. Such references are scanty and contain nothing new or important, but, such as they are, they all represent the beginning of the authority of man over man as due to the need of order and of some method of restraint upon men's evil tendencies. Gerbert (Silvester II.), for instance, says that

it is certain that when our first parents abused their free will by their transgression, man was set over his fellow-man in order to restrain his unlawful desires, and that thus men are held in check by civil and ecclesiastical laws.¹ Again, Othloh of St Emmeran points out that it is impossible that men should live together in peace unless there is some system by which some are subjected to others.² Again, the history of the Bishops of Cambrai, a work which belongs to the eleventh century, commences with a brief account of the beginnings of city life—men, as it was said, at first wandered about like the wild animals, without any government of custom and reason, pursuing blindly the satisfaction of their desires ; it was only when they began to come together into cities that they learned to keep faith and to maintain justice, and to live in obedience to each other.³ These phrases obviously represent formal literary traditions, and are not in themselves of much importance, but they may serve as an introduction to our consideration of the theory of the function or purpose of the state.

We begin by observing that the principle of the just end of the state, which was, as we have seen, very firmly maintained by the political writers of the ninth century, continued to be held in the tenth and eleventh. In the ' *Collectio Canonum* ' of Abbo, the Abbot of Fleury, which is inscribed to Hugh and Robert, Kings of the French (i.e., before 997), he quotes as from a Council of Paris a passage from that treatise ' *De Duodecim Abusivis Sseculi*,' which was much used in the ninth century ; the justice of the king is to oppress no man by force, to judge without favour of persons, to be the defender of strangers and children and widows, to put down vice and crime, to maintain the poor with alms, to set just men over the affairs of the kingdom, to defend his country against its enemies, and to hold the Catholic faith.¹

Ratherius of Verona gives a terse statement of the qualities which make a true king, and without which he may have the name but cannot have the reality of kingship ; these are prudence, justice, courage, and temperance, the man who possesses these qualities, though he be but a peasant, may not improperly be said to be a king, while the man who lacks them though he held the universal monarchy of the world could not rightly be called a king, for the man who governs wrongfully loses his authority.¹

Wippo, in that life of Conrad the Salic to which we have already referred, represents the Archbishop of Maintz, in crowning him, as urging him to remember that he was the vicar of Christ, and that no one but he who imitated Christ was a true ruler, God required of him above all that he should do justice and seek peace for his country, that he should be the defender of churches and clergy, the guardian of widows and orphans.²

These examples will suffice to show that the principles of the political theorists of the ninth century continued to be held until the time of the great conflict between the papacy and the empire. They were not changed by that conflict. Neither the imperialists nor the papalists had any doubt whatever that the true function of the king was to maintain and set forward justice. The papalists might use the principle to justify opposition and resistance to what they conceived to be an unjust authority, and the imperialists to repel attacks upon what they conceived to be the legitimate claims and authority of the

temporal ruler, but they were at one in maintaining that this was the true purpose of all authority.

There is an excellent example of the principles of the imperialist writers in the work called 'De imitate ecclesiae conservanda,' which was written against the Hildebrandine tradition, in the last years of the eleventh century, possibly by Waitram, Bishop of Naumburg. The author's treatment of the questions concerning the relations of Temporal and Spiritual power is important, and we shall have occasion to deal with the treatise again in this connection, but for the moment it is enough to observe that in discussing the nature of the State he cites those passages from the 'De Civitate Dei,' in which St Augustine has preserved Cicero's description of law as being the embodiment of justice, and of the state as that which exists to maintain law and justice.¹

The same conception that the essential character of kingship is to maintain justice is maintained in that treatise of Hugh of Fleury to which we have already referred.¹ He has a very high conception of the nature of the royal authority, he cites both the Pauline doctrine that all authority is from God, and the Gelasian principle that there are two powers by which the world is ruled, the royal and the priestly, while Christ Himself was both King and Priest,² and he reproduces the phrases of Ambrosiaster and Cathulfus, that the king has the image of God the Father, while the bishop has that of Christ, and maintains that the king has authority over all bishops in his kingdom.³ At the same time he maintains very emphatically that the function of the legitimate king is to govern his people in justice and equity, to protect the widows and the poor ; his chief virtues are sobriety, justice, prudence, and temperance.⁴

These illustrations will be sufficient to make it clear that those who belonged to the imperialist party were quite clear that the function or end of the temporal authority was to maintain justice. It is more important to observe that the same principle was firmly maintained by the papalists and anti-imperialists. We have already seen that Manegold of Lautenbach maintained the ultimate divine origin of the temporal power, while, as we shall see presently, he held that it was derived immediately from the community. He was perhaps the most vigorous assailant of Henry IV. and the most radical theorist of the nature of government in the eleventh century, he had as little respect for the arbitrary king as any political writer of the seventeenth century or of the French Revolution. But he founds his opinions, not on the theory that secular authority was a thing illegitimate or improper, but on the principle that as the royal authority excelled all other earthly power in dignity, so it should also excel them all in justice and piety. He who was to have the care of all, to rule over all, should possess greater virtue than all, in order that he might administer his power with the highest equity. The people had not set him over them that he should act as a tyrant, but that he should defend them from tyranny.¹ Again in another passage Manegold urges that the chief distinction between human nature and that of other living creatures is that it is possessed of reason, and that therefore men consider not only what they should do, but why they do it. No man can make himself king or emperor ; when therefore the people set one man over them, they do it in order that he should give to every man his due, that he should protect the good, destroy the wicked, and administer justice to all.²

Berthold of Constance in his Annals expresses the same principle, but in terms derived ultimately from St Isidore of Seville. The true king is he who does right, while the

king who does wrong will lose his kingship ; or rather, he is no king, but only a tyrant.³ Lambert of Hersfeld, in his account of the demands put forward by the Saxons and Thuringians, in the rising of 1073 against Henry IV., represents them as acknowledging that they were indeed bound by their oath of allegiance to Henry, but only if he used his authority for the building up, and not the destruction of the Church of God, if he governed justly and lawfully according to ancestral custom, if he maintained for every man his rank and dignity and law.¹

Again, in the twelfth century John of Salisbury asserts with great emphasis that the Prince is entrusted with his great authority, is even said to be “*legis nexibus absolutus*,” not because he may do unjust things, but because it is his essential character to do justice and equity not out of fear but from love of justice. Who would speak of the mere will of the prince in regard to public matters, when he may not will anything but that which law and equity and the public interest requires ? The prince is the minister of the public utility and the servant of equity, and is the representative of the commonwealth, because he punishes all injuries and crimes with equity.²

We have been compelled to give some space to the consideration of the questions discussed in these two chapters only because there has been some uncertainty as to the position of the political theorists of the eleventh and twelfth centuries, and this uncertainty has arisen owing to the supposed influence of some aspects of St Augustine's theories of Church and State. We shall have to consider the nature of this influence more closely when, in our next volume, we deal with the theory of the relations of the spiritual and temporal powers, and we hope that we shall then be able to see more precisely what influence St Augustine may have exercised. In the meanwhile it is, we hope, quite evident that the conception that the political theorists of the eleventh and twelfth centuries doubted or denied either the divine origin of the State, or the principle that its end and purpose was an ethical one, namely, the maintenance of justice, is a complete mistake. No such doubt was seriously entertained, and the theorists were all convinced that as temporal authority came from God, so also its purpose or function was to maintain the divine justice in the world.

CHAPTER IV.

THE THEORY OF THE “DIVINE RIGHT.”

It is we hope now sufficiently clear that substantially there was no doubt in the great formative period of the Middle Ages which we are now considering—that is, in the eleventh and twelfth centuries—that the State was a divine institution, that political as well as ecclesiastical authority was derived from God, and had an ethical or moral, as well as a material function. We hope to consider the systematic theories of the thirteenth century in a later volume, and cannot here anticipate our discussion of them.

This conception, which, as we have shown, was fully admitted even by the most determined papalists, found its most emphatic expression when the king was called the Vicar of God. The title was not so far as we have seen used by any of the more strictly papalist writers during this period, though it had been frequently used by the Churchmen of the ninth century,¹ but if the phrase was not actually used by them, the conception which it expressed, that the authority of the king is derived from God, was unreservedly admitted.

We have now to consider how far this principle may have been interpreted, in the period which we are now considering, as implying that the authority of the king or ruler

was in such a sense divine that resistance to him was under any and all circumstances unlawful. We have endeavoured to set out the origin of this conception in our first volume ; ² as far as we can judge, it seems to us clear that the conception was substantially an oriental one, which came into the West in the main through certain of the Fathers, and that it was derived by them, immediately, from a one-sided study of certain passages in the historical books of the Old Testament. It was St Gregory the Great who formulated it, and as we shall presently see, it is to his influence that we can generally trace the appearance of the conception in the Middle Ages. We have also showed that while St Gregory the Great drew out the conception with great clearness, and while certain other Fathers may have inclined towards it, yet others, and especially St Ambrose and St Isidore, set out a fundamentally different principle, and that St Isidore especially drew a very sharp distinction between the king and the tyrant.¹

The writers of the ninth century inherited both traditions, and they cited the phrases which belong to both, but it is clear that while they might use the phrases of St Gregory, they were governed rather by the tradition of St Ambrose and St Isidore, and that while they looked upon the secular authority as a divine institution, it was to them divine only so far as it represented the principles of justice and the authority of law.²

These two principles were inherited by the men of the Middle Ages. What did they make of them ? How did they relate them to each other ? We have seen that both parties, in the great conflict of the temporal and spiritual powers, maintained that all authority, whether ecclesiastical or secular, came from God, and that they were at one in maintaining that the function of authority was to uphold justice and righteousness. But there were some who maintained that while this was true, yet the king was answerable only to God, that there was no authority which could judge him, and that the subject must therefore submit even to injustice and oppression, looking only to the just judgment of God to punish the oppressor and to defend the innocent. As we shall presently see, there are traces of this view even before the outbreak of the great conflict between the Papacy and the Empire, but, not unnaturally, in the great conflict, some imperialists, in their anxiety to lay hold of every instrument of defence against the Popes, tended to assert this view with much greater emphasis.

In the tenth century Atto of Vercelli, in one of his letters, maintains very dogmatically that it is an impious thing to resist the king, even though he is unjust and wicked. As St Gregory the Great had done, he cites the example of David, his veneration for the Lord's anointed, and his refusal to lift his hand against him, and he alleges the example of the submissive tone of St Gregory in writing to the Emperor Maurice. He also quotes a passage, which he thinks comes from the writings of St Chrysostom, in which it is said that while it is true that the people elect the king, when he is once elected they cannot depose him, and some canons of a Council of Toledo which condemn revolt against the king, under penalty of excommunication.¹ And, in a passage from another treatise of which we have already cited some words, he explains away a passage of Hosea which seems to imply that there might be kings who had not derived their authority from God, and maintains that even in matters of religion a good man must not resist the king, but must submit patiently to persecution however unjust.²

In a commentary on the Psalms by St Bruno, who was Bishop of Wurzburg from 1034 to 1048, the words, "Against Thee only have I sinned" (Ps. li. 4), are interpreted as

meaning that while a private person who commits an offence transgresses against God and the king, the king transgresses only against God, for there is no man who can judge his actions.¹

The excommunication and deposition of Henry IV. by Gregory VII. raised in its most acute form the question which had already arisen with the great Saxon revolt of 1073, the question how far revolt against the royal authority was a thing legitimate, and more especially the question how far such a revolt was consistent with the Christian conception of the divine nature of secular authority. We do not yet discuss the question of the relation of the spiritual authority to the temporal, though it must be remembered that this was always present to men's minds.

The imperialist party did not necessarily or always take up the position that the temporal power was in such a sense sacred, that it could never under any circumstances be justifiable to revolt against it, but it was natural enough that some of them should have recourse to that tradition of the Church. In Henry IV.'s reply to the bull of deposition of 1076, he denounces Gregory VII.'s arrogance and audacity in venturing to raise his hand against him who had been anointed to the kingdom, while the tradition of the holy Fathers taught that he could be judged by God alone, and could be deposed for no crime, except for that of departing from the faith; the Fathers indeed had not judged or deposed even the apostate Julian, but had left him to the judgment of God.¹ Berthold of Constance, in his Annals for the year 1077, relates how some of the clergy were continually proclaiming that neither the Pope nor any other authority could judge kings, whatever might be the crimes of which they were guilty, even if they were heretics.² Berthold himself holds this conception to be absurd, but his evidence is only the more important.

The source of this opinion is obviously in the main the tradition of some of the Christian Fathers, and especially of St Gregory the Great. There is a very good example of this in a treatise written about 1080 by Wenrich, the head of the educational school at Trier, afterwards Bishop of Vercelli, in the name of Theodoric, the Bishop of Verdun, who was at that time one of the supporters of Henry IV. It is a protest against Gregory VII.'s action in deposing Henry IV. and encouraging the German princes to revolt against him. He maintains that such conduct was contrary to the law of God,¹ and urges the example of the humility and courtesy of Gregory the Great, who even when he reproved the authorities of the State was careful to address them in terms befitting their dignity, and protested that he recognised that he owed obedience to kings, and acted in this spirit even in regard to actions of which he disapproved. When the emperor required him to promulgate a law forbidding the reception of soldiers into monasteries, he protested against it as contrary to the law of God, but he carried out the imperial order for its promulgation.²

Another example will be found in the treatise 'De imitate ecclesiae conservanda.' The author was a determined partisan of the cause of Henry IV. against the Hildebrandine party, and contrasts Hildebrand's conduct with that of Gregory the Great. Hildebrand claimed to have authority over kings and kingdoms, while Gregory the Great, with true humility, called himself the servant of servants, and in his book on "Pastoral Care" he set out the conduct of David as an example to all good

subjects who have bad rulers. David would not take advantage of the opportunity to slay his persecutor, but repented that he had even cut off the skirt of his cloak ; and the author cites the words of Gregory the Great, in which he condemns even criticism of the conduct of the ruler, lest men should transgress against God who gave them their authority.¹ He looks upon the successive deaths of Rudolph of Suabia and of Hermann of Luxemburg, who had been set up against Henry IV., as examples of the judgment of God upon those who revolted against their lawful king, who had received his authority from God, for neither the princes nor the people of that party could destroy that authority.²

The same principles were maintained by others of the imperialist party. In the work known as the ‘ *Liber Canonum contra Henricum quartum*,’ which, as it is thought, was compiled in the year 1085, the supporters of Henry IV. are represented as bringing forward the authority of St Augustine and St John Chrysostom to prove the impropriety of the action of Hildebrand in excommunicating Henry IV. The passage cited from St Augustine affirms the divine origin of the temporal authority, and the duty of obedience by Christian men even to an unbelieving emperor such as Julian. The passage attributed to St John Chrysostom is the same as that quoted by Atto of Vercelli, and sets out the principle that, while no man can make himself king but only the people, when the king has once been elected and confirmed the people cannot depose him.¹ These words are again substantially reproduced in the collection of Epistles, &c., of the Cardinals who were in opposition to Hildebrand and Urban II.²

Again, Sigebert of Gembloux, in a letter written in the name of the clergy of Lidge about the year 1103 against Pope Paschal II., urges that even if the emperor were such as the papal party represented him to be, his subjects must submit, for it is their sins which merited such a ruler.³

The most complete statement, perhaps, of the doctrine of non-resistance, and of the conception that the king is responsible only to God for his conduct, which is to be found in the literature of this period, is contained in the treatise written by Gregory of Catino in the name of the monks of Farfa, probably in the year 1111. He maintains very emphatically that the royal or imperial authority could not be condemned or overthrown by any man. The authority of the saints both of the Old and New Testaments showed that rulers must be endured rather than condemned ; no one of the saints and prophets and other orthodox Christians had ever ventured to condemn or depose a king or emperor, even though he had been unjust or impious or heretical. That wisdom which is Christ said, “ By Me kings reign,” and by Him therefore alone can they be condemned. Saul and David sinned, but neither Samuel nor Nathan ventured to condemn them. Many kings and emperors both before and after the coming of Christ were wicked and heretical, but none of the prophets, or apostles, or saints condemned them or attempted to take from them the obedience and dignity which was their due, but left this to God, and endured their persecutions for Christ’s sake ; even Christ Himself, while He lived in the flesh, condemned no man. Gregory then relates a number of examples of the conduct of the Christian Fathers, as illustrating this principle, and it is noteworthy that he points out quite correctly that Pope Gregory II. restrained the Italians when they wished to revolt against Leo the Iconoclast and to set up another emperor. Finally, summing up the whole matter, he urges that it is God only, the Almighty creator of kingdoms and empires, who can grant

them or take them away, and that he who resists the powers that have been ordained by God resists the ordinance of God.¹

CHAPTER V.

JUSTICE AND LAW.

WE have so far endeavoured to make it clear that the political theory of the eleventh and twelfth centuries held firmly to the principle of the divine origin and authority of government, and the conviction that its function was to maintain righteousness and justice. In the last chapter we have seen that with some writers, and especially among those who were engaged in defending the imperial position in the great conflict with the papacy, the principle of the divine nature of government sometimes passes into the conception that the authority of the ruler was in such a sense divine that it could never be resisted, whether it was used justly and wisely, or foolishly and unrighteously, and that the king was responsible for his actions to God only.

This conception was not unimportant, and indeed in later times, and especially in the seventeenth century, assumed a considerable significance. But it was not the normal theory of the Middle Ages, and we must now consider aspects of the political ideas and principles of those times which were both more completely developed in theory, and also much more closely related to the actual political and constitutional movements of these centuries.

As we have already seen, there were two traditions which had come down from the Fathers—the one, with which we have just dealt, that the authority of the king was always sacred, whether it was used justly or unjustly, the other, that as the function of kingship lay in maintaining justice and righteousness, he was no true king who did not behave justly, who did not govern himself and his people under the terms of righteousness and

equity. In the first volume of this work it has been pointed out how fully this conception was developed, and how firmly it was held in the ninth century,¹ and as we shall presently see it was equally firmly maintained in the eleventh and twelfth centuries.

There was a related principle which had governed men's minds and controlled their actions in the earlier Middle Ages, which has also been fully dealt with in the first volume, and that is the principle that the just order of the State is embodied in its law, that to govern justly is to govern according to the law.² We have in the first part of this volume considered the high development of this conception in the feudal organisation of society, and in the principles of the feudal lawyers ; we have now to consider its place in the political circumstances and in the general political theory of this period.

And finally, we have in the first volume considered the early stages of the conception of the authority of the ruler as representing the authority of the community, and as being dependent upon the faithful discharge of the obligations which he had undertaken,³ we must now consider the rapid development and the great importance of this principle in the Middle Ages.

We have already pointed out that the writers of the period with which we are dealing are united in maintaining that the purpose and function of all authority is to maintain righteousness and justice, that the ambiguities of St Augustine had no effect upon them. We must now observe that this principle was constantly drawn out to the very important conclusion that where there was no justice there was no King, but only a Tyrant. This distinction between the King and the Tyrant was indeed one of the most important of the

political conceptions of the Middle Ages. The distinction is the same in principle as that of Aristotle, but it was not from him that it was drawn, at least directly. Directly it came to them from St Isidore of Seville ⁴ and the writers of the ninth century, and it is probable that it is Cicero from whom St Isidore derived it.

The most complete statement of the conception is to be found in the 'Policraticus' of John of Salisbury. We shall have to discuss his political theory in detail presently, but we may begin by noticing some words in which he expresses this principle. This, he says, is the only or the supreme difference between the tyrant and the prince, that the prince governs the people according to law and obeys the law himself,¹ the tyrant is one who oppresses the people by violence, and is never satisfied unless he makes the law void and reduces the people to slavery.² The essence of kingship is respect for law and the just rights and liberties of the people, without them a man may have the name, but not the reality of authority. We can trace the significance of this conception through the whole political literature of the Middle Ages.

We have seen its great importance in the ninth century, and even in the scanty literature of political theory in the tenth and early eleventh centuries we find the essential principle firmly maintained. We have already referred to a passage in the 'Prseloquiorum' of Ratherius of Verona which has this meaning, but it is worth while to look at it again. There are certain qualities without which a man may indeed have the name but not the reality of kingship; the king must be prudent, just, brave, and self-restrained; the man who possesses these qualities, though he were a peasant, may not improperly be called a king—without them, even if a man held the dominion of the whole world, he could not justly be called a king, for when a man governs ill he loses his authority.³ We may put beside this a phrase from the "Proverbs" attributed to that Wippo, from whose life of Conrad the Salic we have already quoted. The king, he says, must learn and hearken to the law, for to keep the law is to reign.¹

We have begun by citing these phrases, not because they are in themselves specially important, but only in order that we may be clear that these principles were not merely thrown out in the great conflicts of the eleventh and twelfth centuries, but that they represent the normal convictions of mediaeval society, which were continuous with those of the ninth century. It is true that these great conflicts forced men to consider over again their principles, and to determine what practical action they were prepared to take in order to enforce them; the political development of European civilisation from the middle of the tenth century to the end of the thirteenth was indeed almost incredibly rapid, and it would be absurd to imagine that the ideas or principles embodied in these constitutional developments were not themselves greatly modified, or enlarged, in the process; but at least, as we understand it, the movement of ideas was continuous and organic.

The principle that unless the king is just and rules according to law he is no true king is the first principle of the mediaeval theory of government, and was firmly held even before the great political agitations of the eleventh and twelfth centuries compelled men to think out the real nature of their political convictions. While, however, this is true, it is also true that these great disturbances had in a very high degree the effect of stimulating political reflection, and it is no doubt to this that we owe it that, after the comparative silence of the tenth century, we suddenly find ourselves, in the latter part of the eleventh

century, and in the twelfth, in face of a great production of political pamphlets and treatises.

It is not our part here to trace the political and constitutional movements of the several European countries, but the history of political ideas would be unintelligible if we were not to bear in mind something of the general nature of these movements. We must not make the mistake of imagining that the interests and energies of the European people were concentrated upon the struggle between the Papacy and the Empire, or the related conflicts of Church and State in the various European countries. No doubt these were not only of high importance in themselves, but they had a great influence in stimulating political thought. And yet it may be doubted whether they had, taken by themselves, any serious effect on the constitutional development of European civilisation. We hope in the next volume to examine the questions related to these conflicts in detail, and to consider the nature of the oppositions or difficulties which lay behind them. But the political or constitutional development of Europe was not caused by them, or dependent upon them. All this is familiar to the students of the constitutional history of the European countries, but it is sometimes forgotten by those who are not well acquainted with this.

The history of the political theory of the Middle Ages was organically and continually related to the development of the political civilisation of Europe; no doubt, as we have constantly endeavoured to show, it derives its terms, and much of its substantial tradition from the past, but it was shaped and moulded in the actual movement of these times.

It was with the political agitations and revolts of Germany in the latter part of the eleventh century that active political speculation and controversy began. We cannot here deal with the real nature of the circumstances which lay behind the great revolt of the Saxons and Thuringians against Henry IV. It is enough for our purpose to observe that it raised at once the fundamental questions as to the nature and conditions of political authority. We have cited the words of Ratherius and Wippo as illustrating the commonplaces of literature before the great movements of the eleventh century ; with the outbreak of the Saxon revolt against Henry IV. in 1073 these commonplaces assumed another aspect, and became the foundations of a rapidly developing political theory.

We have already ¹ referred to the terms of the demands which Lambert of Hersfeld attributes to the Saxons and Thuringians in the revolt of 1073, but we must now consider these a little more closely. They demand that he should do justice to the Saxon princes whose properties he had confiscated without legal process, and that he should do this in accordance with the judgment of the princes, that he should put away from his court the lowborn persons by whose counsels he had administered the state, and should entrust the care of the great affairs of the kingdom to the princes to whom this belonged, that he should dismiss his concubines and restore the queen to her proper position, and that he should do justice to those who asked for it. If he would do these things they would with ready minds obey him, under those terms which became free men born in a free empire, but if he would not amend his ways, they as Christian men would not associate with one who was guilty of the worst crimes. They had indeed sworn obedience to him, but only as to a king who would uphold the Church of God, and would rule justly and lawfully according to ancestral custom, and would maintain the rank and dignity, and hold inviolate the laws proper to every man. If he violated these things they would not hold themselves bound by their oath, but would wage a just war against him as a

barbarian enemy, and an oppressor of the Christian name, and would fight till their last breath for the Church of God, for the Christian faith, and for their own liberty.²

As we have just said, we are not here concerned with the real nature of the revolt of the Saxons and its ultimate causes and character, it is not difficult to recognise even in this passage something of the complexity of the situation, and we cannot feel any confidence that these particular principles were urged by the leaders of the revolt against Henry IV. in these terms. We must indeed take them rather as representing the ideas and theories and, probably, the literary reminiscences of Lambert. But they are not the less significant on that account. The passage contains some constitutional conceptions with which we shall deal later, but in the meanwhile we can fix our attention on the sharp and definite character of the distinction between the king to whom men swear allegiance, and the unjust ruler who sets at naught the law and rights of his subjects, and to whom therefore men are under no obligations. It is the history of this conception which we must trace farther.

We may put alongside of this passage from Lambert the terms of a speech which Bruno, the author of the 'De Bello Saxonico,' puts into the mouth of Otto, who had been Duke of Bavaria. It is represented as addressed to the Saxons at "Normeslovo" in 1073. He exhorts them to rise against Henry, and urges upon them that the castles which Henry was building were intended to destroy their liberty, and in fiery terms he asks whether, when even slaves would not endure the injustice of their masters, they who were born in liberty were prepared to endure slavery. Perhaps, he says, as Christian men they feared to violate their oath of allegiance to the king; yes I but they were made to one who was indeed a king. While Henry was a king, and did those things which were proper to a king, he had kept the faith which he had sworn to him whole and undetiled, but when he ceased to be a king he was no longer such that he should keep faith to him. He had taken up arms, and adjured them to take up arms, not against the king, but against the unjust assailant of his liberty, not against his country, but for his country, and for that liberty which no good man would consent to lose except with his life.¹

Lambert of Hersfeld sets out the same principle, but in more technical terms. He represents Otto as urging at another time that herein lay the difference between the king and the tyrant, that the tyrant compels the obedience of unwilling subjects by violence and cruelty, while the king governs his subjects by laws and ancestral custom.²

Berthold of Constance in his Annals for the year 1077 relates, as we have already mentioned,³ how on Henry's return to Germany after his absolution by Hildebrand at Canossa, many of the clergy maintained that no one could judge or condemn a king however wicked and criminal. Berthold himself holds that this opinion is absurd, and cites, though without mentioning his source, St Isidore of Seville's phrases, that the king holds his title while he does right, if he acts wrongfully he loses it; and maintains that those who do wickedly and unjustly are really tyrants, and are only improperly called kings.⁴ The same phrases are again quoted by Hugh, Abbot of Flavigny, in defending the deposition of Henry IV.¹

Herrand, Bishop of Halberstadt, writing in the name of Louis the Count of Thuringia about 1094 or 1095, expresses the same conceptions, but in a more developed form, in his answer to a letter of Waitram the Bishop of Naumburg. Waitram had urged the authority

of the words of St Paul: "Let every soul be subject to the higher powers, for there is no power but of God." Herrand replies that Waltram was misinterpreting St Paul, for if every authority was from God how could the prophet (Hosea viii. 4) have spoken of princes who reigned, but not as of God. They were willing to obey an ordered power, but how could such a government as that of Henry IV. be called an order at all; it is not order to confound right and wrong. Again, in a later passage, answering Waitram's contention that concord was useful to the kingdom, Herrand replies that it was absurd to speak thus of a society which could not be called a kingdom, for a kingdom is something rightful; could that be called a kingdom where innocence was oppressed, where there was no place for reason, for judgment, or for counsel, where every desire was reckoned to be lawful? Such a kingdom should rather be called a congregation of the wicked, a council of vanity, the dregs of iniquity; in such a kingdom concord is unprofitable. Among good men indeed concord is praiseworthy, but among evil men it is blameworthy; what man in his right mind would speak with approval of a concord of robbers, of thieves, of unclean persons? ²

The distinction between the true king and the tyrant, between just and legal authority, which was the characteristic of the true commonwealth, and mere violence and unjust power, was indeed firmly fixed in the minds of all mediaeval thinkers, and we find it clearly set out even in the writings of those who were the strongest upholders of the imperial or royal authority. We have already had occasion to discuss the opinions of Hugh of Fleury as represented in his treatise on the royal and sacerdotal powers, addressed to Henry I. of England. We have seen how stoutly he maintains, against the apparent meaning of certain phrases of Hildebrand, that the authority of the king is from God, and that he even repeats those phrases, which had been used by Ambrosiaster and Cathulfus, in which the king is described as bearing the image of God, while the bishop bears that of Christ.¹ And while, as we have seen, he holds very clearly that the function of the king is to maintain justice and equity, he also urges that the honour due to those in authority must not be measured by their personal qualities, but by the place which they hold, and that therefore even heathen rulers must receive the honour due to their position.² And yet he also warns kings and princes and tyrants that those who refuse to keep the commandments of God are wont to lose their power and authority, and that it frequently happens that the people revolt against such a king.¹

The author of the controversial pamphlets which have been published as the 'Tractatus Eboracenses' sets the temporal power higher perhaps than any other writer of the Middle Ages, and in a strange phrase which has some resemblance to that of Hugh of Fleury he speaks of the priest as representing the human nature of Christ, while the king represents the divine nature.² But even he recognises that there have been kings who were no true kings but only tyrants.³ He does not indeed say that they are to be resisted, but he is aware of the distinction between the true and false king. In another passage he makes the distinction very clear between the authority which is always good, and the person of the ruler who may be evil. Our Lord had bidden men give to Caesar that which was Caesar's. He did not say, render to Tiberius that which is Tiberius'; render to the authority, not to the person, the person may be evil, the authority is just, Tiberius may be wicked, but Caesar is good. Render, therefore, not to the evil person, to the wicked Tiberius, but to the just authority, to the good Caesar, that which is his.¹

If these are the judgments, even of those who defended the temporal authority against what they conceived to be the unreasonable claims of the spiritual power, we need not be surprised that the supporters of the political or ecclesiastical opposition pressed them still more emphatically. We shall have occasion presently to deal with the position of Manegold in detail, but in the meanwhile we may observe how sharply he draws the distinction between kingship and tyranny, and how emphatically he states the conclusion that the ruler who governs tyrannically has no claim whatever upon the obedience of his people. The people, he says, did not exalt the ruler over themselves in order that he should have freedom to tyrannise over them, but in order that he should defend them from the tyranny of others. It is therefore clear that when he who was elected to restrain the wicked and to defend the good, actually becomes evil, oppresses the good, and is guilty of that tyranny which it was his duty to repel, he justly falls from the dignity which was granted to him, and that the people are free from their subjection to him, inasmuch as he has violated that agreement in virtue of which he was appointed.²

As we have already said, the conception of the fundamental difference between the king and the tyrant is developed more clearly and completely by John of Salisbury than by any other writer of these centuries. We have from time to time cited various passages from his 'Policraticus,' but his position in the history of political theory is so important and so representative that we must consider it briefly as a whole.

We have already cited some of the phrases in which he draws out the distinction between the king and the tyrant; we must look at these more closely. This, he says, is the only or the greatest difference between the prince and the tyrant, that the prince obeys the law, and governs the people, whose servant he reckons himself to be, according to the law ; he claims, in the name of the law, the first place in carrying out the public offices, and in submitting to the burdens of the commonwealth ; he is superior to other men in this, that while others have their particular obligations, he is bound to bear all the burdens of the State. The prince is endued with the authority of all, in order that he may the better minister to the needs of all. The will of the prince is never contrary to justice. The prince is the public authority, and an image on earth of the divine majesty, and his authority is derived from God. The passage concludes with those famous phrases of the Code in which it is said that the authority of the prince depends upon the law, and that it is a thing greater than empire to submit the princely authority to the laws.¹

For the definition of the tyrant we must turn to a later passage, where we find it said that the philosophers have described him as one who oppresses the people by violent domination, while the prince is one who rules by the laws. The prince strives for the maintenance of the law and the liberty of the people ; the tyrant is never satisfied until he has made void the laws and has reduced the people to slavery. The prince is the image of God, and is to be loved and cherished ; while the tyrant is the image of wickedness, and often it is meet that he should be slain. The origin of tyranny is iniquity, and it is this poison of unrighteousness and injustice which is the source of all the troubles and conflicts of the world.¹

It is specially important to observe that to John of Salisbury the essence of the distinction between the tyrant and the prince lies in his relation to law. In other places he enforces the principle in very interesting phrases. There are some, he says, who whisper or even publicly proclaim that the prince is not subject to the law, and that whatever

pleases him has the force of law; that is, not merely that which he, as legislator, has established as law in accordance with equity, but whatever he may chance to will. The truth is, that when they thus withdraw the king from the bonds of the law they make him an outlaw. John does not indeed desire to destroy the dispensing power of the ruler, but he refuses to submit the permanent commands or prohibitions of the law to his caprice.¹ We may compare with these words those of another passage in which he urges that all men are bound by the law; the prince is said to be free from the law, not because he may do unjust things, but because his character should be such that he follows equity and serves the commonwealth, not from fear of punishment, but for love of justice, and that he always prefers the convenience of others to his own personal desires. It is indeed meaningless to speak of the prince's desires in respect to public matters, for he may not desire anything but what law and equity and the common good require; his will has indeed in these matters the force of law, but only because it in no way departs from equity. The prince is the servant of the public good and the slave of equity, and bears the public person, because he punishes all injuries and crimes with equity.²

It is important to observe, in considering these passages, how much John of Salisbury is affected by the revived study of the Roman law; his reference to Vacarius, and the progress of the influence of the Roman jurisprudence in England, in spite of the attempts to restrain it, is well known;¹ and the effects of his own study are very clearly illustrated in the passages we have just discussed. He is evidently gravely concerned to find a just meaning for such phrases, as that the prince is "*legibus solutus*," or "*quod principi placuit legis habet vigorem*," for evidently they had, by some, been used to defend the conception that the prince was not subject to the law, and that even his capricious desires might override the law. Such conceptions seem to him monstrous and impossible. The will of the prince which is to have the force of law can only be that which is in accordance with equity and law. He is only free in relation to law in the sense that his true character is that of a man who freely obeys the law of equity. It is specially interesting to notice his phrase about the result of withdrawing the prince from the authority of the law, that the true result of this is to make him an outlaw—that is, a person to whom all legal obligations cease.

To appreciate the significance of these principles of John of Salisbury completely, we must bear in mind not only the traditions which we have considered in this chapter, but also the whole tradition of the feudal lawyers, culminating in the dogmatic affirmation of Bracton that the king is under the law.² It is evident that John approaches the discussion of these questions formally through the medium of the Roman law and other literary traditions, but that his actual judgment corresponds with and expresses the effects of the political traditions and the practical circumstances and necessities of his own time.

The legitimate prince or ruler is thus distinguished, in John of Salisbury's mind, by this, that he governs according to law.

What is then the law to which he is subject, and which it is his function to administer? It does not represent the arbitrary will of the ruler, nor even of the community. John finds expression for his principles in terms derived partly from the contemporary Civilians and partly from the Digest. The prince, he says, must remember that his justice is subordinate to that of God, whose justice is eternal and whose law is equity. He defines equity in terms used by a number of the Civilians, as "*rerum convenientia . . . quae*

cuncta coaequiparat ratione et imparibus (in paribus) rebus paria iura desiderat,” and as that which gives to every man his own. Law is the interpreter of this equity, and he cites the words of Chrysippus as quoted in the Digest, that it is law which orders all things divine and human, and those of Papinian and Demosthenes, that law is formed and given by God, is taught by wise men, and established by the commonwealth. All, therefore, he concludes, are bound to obey the law, unless perchance some one claims to have licence to commit iniquity.¹

In another place John of Salisbury takes from the work which he knew as the ‘*Institutio Traiani*,’ and attributed to Plutarch, a definition of the commonwealth which represents the conception that all political authority embodies the principles of equity and reason. The commonwealth, he represents the work as saying, is a body which is animated by the benefit of the divine gift, and is conducted at the bidding of the highest equity, and controlled by the rule of reason.¹

The authority of the law and the State is the authority of justice and reason, and it is impossible therefore for John to conceive of any ruler as being legitimate, or as having any real claim to authority, unless he is obedient to the law, which is the embodiment of justice and reason.

What are then the conclusions which John of Salisbury draws from these principles, in regard to the practical questions of the relations of subjects and rulers ? It is true that he is a little hampered by the recollection of the Augustinian and Gregorian tradition ; that he remembers that in the patristic tradition the evil ruler may be the instrument of God’s punishment upon an evil people.² And in one passage he seems at least doubtful whether it is lawful for a man to seek the death of him to whom he is bound by fidelity and oath, and he mentions with approbation the conduct of David who would not use violence against Saul, and of those who in oppression pray to God for deliverance.¹

When, however, we have allowed for certain qualifications, it remains true that John of Salisbury maintains very emphatically that the tyrant has no rights against the people, and may justly and rightfully be slain. He deals with the matter first at the end of the third book, and says that it is not only lawful to kill the tyrant, but equitable and just, for it is right that he who takes the sword should perish by the sword. That is, he who usurps the sword, not he who receives it from the Lord. He who receives his authority from God, serves the law, and is the minister of justice and the law, while he who usurps

authority subjects the law to his will. It is therefore right that the laws should take arms against him who disarms them. There are many forms of treason, but there is none graver than that which attacks the whole system of justice. If in the case of treason any one may act as a prosecutor, how much more in the case of that crime which attacks the laws which should control even the emperor. Assuredly no one will avenge the public enemy, and he who does not attack him is guilty of a crime against himself and the whole body of the Commonwealth.¹

These principles are constantly maintained by him. We have already seen how, in that passage in which he describes the character of the tyrant, he says that while the prince, who bears the divine image, is to be loved and venerated, the tyrant, who has the image of wickedness, often ought to be slain. Again, in the same chapter, where he has urged that there may be ecclesiastical as well as secular tyrants, he says that if the secular

tyrant may properly, according to divine and human law, be slain, we cannot think that the tyrant who bears the priesthood is to be loved and cherished. And again, in a later chapter, he says that it is clear from history that it is just to slay public tyrants, and to set free the people for the service of God ; the priests of the Lord reckon their slaughter to be an act of piety.²

His judgment is admirably summed up in the chapters in which he illustrates the just end of the tyrant from Roman and from Jewish history. He sets out in eloquent words the greatness and excellence of Julius Caesar, “ *Homo perpaucorum et cui nullum expresse similem adhuc edidit natura mortalium*,” and yet, because he took command of the commonwealth by force of arms, he was deemed to be a tyrant, and, with the consent of a great part of the senate, was slain in the Capitol. Augustus forbade men to call him lord, and living as a citizen avoided both the name and the reality of tyranny. Tiberius was slain by poison, and though poisoning is a detestable thing, yet the world judged the poison by which he was destroyed to be life-giving. Caligula, the third tyrant, was slain by his servants, and with the death of Nero, the most monstrous and wicked of men, the family of the Csesars came to an end. Lest it should be thought that such deeds against tyranny were permitted by the laws against that family only, John recalls the murder of Vitellius and Domitian. With the cruel tyranny and bloody end of those tyrants he contrasts the justice and felicity of the emperors from Nerva to Marcus Aurelius. Passing then to Jewish history, he describes the end of many tyrants, from Eglon, King of Moab, to Holofernes, “ *Finis enim tirannorum confusio est : ad interitum quidem, si in malitia perseverant; si revocantur, ad veniam.*”¹

John of Salisbury sums up, no doubt in extreme and somewhat harsh terms, the normal doctrine of these centuries, that there can be no legitimate government which does not represent

the principle of justice, and that this justice is embodied in the law. The ruler who is unjust, and who violates the laws and customs of his country, has ceased to have any claim to the obedience of his subjects, and may justly be resisted, and if necessary deposed and killed. It is probable that the somewhat harsh terms of his doctrine of tyrannicide are due to the influence of his study of classical literature and history, and it is interesting to observe the first effects of the direct study of the ancient world. But though the form of his principle of the right of resistance to unjust and illegal authority is probably literary in its origin, and might not have met with general approbation, yet the essential principle which he maintains is the normal view of the Middle Ages.

CHAPTER VI.

CONSTITUTIONAL THEORY AND CONTRACT.

WE have so far endeavoured to trace the development of the conception that political authority is controlled and limited by the principle of justice, and by the law as the embodiment of this. There is no doubt that in this conception we have one of the most important apprehensions of political theory in the Middle Ages. In modern times it may seem that the principle does not take us very far, for we always tend to ask what is justice, and whether the law is just, and this is the natural tendency of a time when men are conscious of movement and change. In the Middle Ages the conditions of civilisation were actually changing probably as rapidly as they are today, but men were hardly conscious of change, and the appeal to precedent, to tradition, was probably almost wholly sincere.

While, however, the belief in the supremacy of law and justice is of the first importance, yet it is also true that a society which is civilised and moving towards greater civilisation must not only be possessed of some ideal or ethical principles, but must also develop some method or form for securing the effective authority of its principles. In the Middle Ages this was represented by the development of the conception that the ruler received his authority, sometimes by the principle of hereditary succession in some one family, but never without the election or recognition of the great men, or the community as a whole—and these two cannot be separated in the mediaeval apprehension. And the authority which the mediaeval ruler thus held by the authority of the community, he exercised and could only exercise normally with the counsel of the great men of the community.

We have considered the earlier stages in the development of these principles in our first volume, and they were too firmly rooted in the structure of mediaeval society to die out even in the chaos of the tenth century ; but it is no doubt true that in this respect, as with regard to the other principles of political authority, it was the great civil and religious conflicts of the eleventh and twelfth centuries which made men clearly conscious of ideas and convictions which had always been implicit, but had only occasionally been expressed. It is, however, important to observe that, even before these violent conflicts compelled men to make real to themselves their political principles, we can find occasional but very clear expressions of what we may call the constitutional conception of authority.

Here is, for instance, a very characteristic expression of the principle that the king governs only with the counsel of his faithful men. This is contained in a letter written by Gerbert (afterwards Pope Sylvester II.) in the name of Hugh, King of France, to the Archbishop of Sens. The king was evidently somewhat doubtful of the loyalty of the archbishop, who had probably not been present at his consecration in Rheims in July 987, and admonishes him with some asperity to make his allegiance before November, and, evidently in order to reassure him, declares that he has no intention of abusing the royal power, but intends to administer the affairs of the state with the advice and judgment of his faithful men, among whom he reckons the archbishop as one of the most honourable.¹

We find the same principle expressed in a contemporary work of Abbo, the Abbot of Fleury. How can the king, he says, deal with the affairs of the kingdom and drive out injustice except with the advice of the bishops and chief men of the kingdom ? how can he discharge his functions if they do not by their help and counsel show him that honour and reverence which is due ?—the king alone is not equal to all that the needs of the kingdom require. And he appeals to the obligations which they had taken upon themselves in electing him to the kingdom, for it were better not to have assented to his election than to condemn him whom they had elected. There are three important elections, he says—that of the king or emperor, which is made by the agreement of the whole kingdom ; that of the bishop, which represents the unanimous agreement of the clergy and people ; and that of the abbot, which is made by the wiser judgment of the community.¹

This conception corresponds precisely with the contemporary forms of legislative or quasi-legislative action. The *Capitula* issued by the Emperor Otto I. at Verona in 967 are said to be established by the emperor and his son Otto the king, with the chief princes—

that is, the bishop, abbots, and judges, along with the whole people.² And again, the Emperor Henry II.

issued in 1022 the Constitution confirming and approving certain synodical legislation of Pope Benedict VIII., along with the senators, the officers of the palace, and the friends of the commonwealth.¹

It is not within the scope of our work to deal with the development of the constitutions of the European states, but it is impossible to separate the history of political theory from the history of the growth of institutions. This is always true, but especially in the earlier Middle Ages, when there was very little merely abstract political speculation. In the thirteenth and fourteenth centuries this was somewhat different, but we hope to deal with this later. In the eleventh and twelfth centuries it is obvious that political theory arises very largely out of the conflicts of the time, and reflects in the main the constitutional principles of the European societies, as men conceived them. While therefore we must keep clear of any attempt to give an account of the constitutional organisation of Western Europe, we must endeavour by means of a few illustrations to indicate what seem to us to be some of its most important principles.

There is no doubt that in the Middle Ages the authority of the ruler was conceived of as normally depending upon the election, or at least the recognition, of the community. The conception of a strictly hereditary right to monarchy is not a mediaeval conception. In France and England no doubt the principle of succession within one family established itself early. But students of English history do not need to be reminded that some form of election or recognition was always a regular part of the constitutional process of succession to the throne. And in France it was not really otherwise, though the strictly hereditary principle may be thought of as having established itself there more rapidly. In the Empire the succession was elective, and if at any time during the eleventh century it might have tended to become hereditary, this tendency was abruptly checked in the great civil wars of Henry IV.'s reign, and in the troubles of the thirteenth century.

It is worth while to notice some of the phrases in which this is expressed. Hermann of Reichenau relates how the Emperor Henry III. procured the election of his infant son as king at Tribur in 1053, but mentions that the election was made subject to the condition that he should prove a just ruler.¹ Bruno relates how at the council of Forchheim, in 1077, it was determined by the common consent, and approved by the authority of the Roman pontiff, that no one should receive the royal authority by hereditary succession as had been the custom, but that the son of the king, even though he were wholly worthy, should succeed to the kingdom by free election rather than by hereditary right; while if he were not worthy, or if the people did not desire him, they should have it in their power to make him king whom they would.²

This principle is again expressed, and something more of its significance indicated, in the circular letter issued by the Archbishops of Cologne and Mainz and other bishops and princes on the occasion of the death of Henry V. in 1125. They announce the Emperor's death, and say that they have celebrated his funeral, and that they now propose to hold an assembly to consider the condition of the kingdom and to arrange for a successor. They disclaim all intention of prejudicing the decision of those to whom they write, but they express the hope that they will be mindful of the oppression of the Church and kingdom, and will invoke the help of God that He would so guide the election of a

successor that the Church and kingdom might be free from the slavery in which they had been held, and might live under their own laws, and that the princes and the people might have peace.¹ The writers of the letter not only claim the right of determining the succession, but also clearly consider that this right should be used to provide security for good government and the due observance of the laws.

We can find another illustration of the recognition of the elective principle, and of the conception that it involved definite obligations on the part of the chosen ruler, in the letter sent to Pope Eugenius IH. in the name of Frederick I. (Barbarossa) on his election to the kingdom in 1152. He speaks of himself as having been clothed with the royal dignity, partly by the homage of the lay princes, partly by the benediction of the bishops, and as having put on the royal mind, and that therefore he purposes, according to the terms of that promise which he made when he was enthroned and consecrated, to give all honour and love to the Pope and the Roman Church, to all ecclesiastical persons the ready justice and defence which was their due, and to widows and orphans and the whole people entrusted to him law and peace.²

We have already dealt with the treatment of this question in the feudal law books, but it is worth while to notice again the emphatic terms in which the principle of election is set out in the 'Sachsenspiegel.' The Germans, according to the law, are to elect the king, when the king is elected he is to swear that he will maintain the law, and put down all that is against it.¹ And in another place the author lays down the principle of election in the broadest terms when he says that all authority is founded upon election.² What the exact significance of the latter phrase may be is difficult to say, but at least it seems to illustrate the breadth and importance of the elective principle.

The fact that in mediaeval theory the authority of the king is founded upon the election or at least the recognition of the community does not in truth require any serious demonstration. It is very important, however, to notice that it is not only in the election or succession of the ruler that the authority of the community was recognised, but that in some sense or another the legislative action of the ruler was limited and conditioned by the counsel and assent of the great men of the community. This is clear in the first place from the formulae which are used in all legislative or quasi-legislative actions. We may take a few examples from the twelfth century.

The great settlement of Worms in 1122 was embodied in the 'Privilegium Imperatoris,' in which Henry V. agreed to resign the imperial claim to the right of investiture of bishops with the ring and staff. This is expressly said to be done with the counsel and consent of the princes whose names are subscribed.³

Lothar III.'s Constitution, 'De Feudorum Distractio,' of 1136, was made on the exhortation and counsel of the archbishops, bishops, dukes, and other nobles and judges.¹ Frederick I. issued the feudal constitutions of Roncaglia after taking counsel with the bishops, dukes, marquesses, counts, judges of the palace, and other chief persons.²

It is not, however, only in the formal preambles of legislation that we find this principle recognised. It was expressly asserted as a principle of government by so great and masterful an emperor as Frederick Barbarossa. In replying to certain demands of Pope Hadrian IV. in relation to the papal and imperial position in the city of Rome, and to certain claims of the imperial authority on ecclesiastical persons in Italy, Frederick, while giving a provisional answer, says that he cannot give a complete answer until he has consulted the princes.³

There is really no doubt whatever that in the normal tradition of the Middle Ages the position of the ruler was conceived of as that of one who ruled with the advice and consent of the chief persons of the community.⁴ The relation of this to the feudal conceptions, as we have endeavoured to set them out, is obvious, but the tradition was older than the feudal system.⁶ The authority of the mediaeval ruler rested upon the election or consent of the community, and was exercised normally and constitutionally with the advice of persons who were not merely his dependents or creatures, but were in some sense, however vague and undetermined, the representatives of the community.

It was the great civil conflicts of the eleventh century which compelled men in the Empire to consider how far the conditions and assumptions of constitutional order gave the community or its chief men the right to take such action as might secure the purposes for which the ruler had been elected or recognised. It is from this standpoint that we must again consider the principles of government which are presented by the historians of the great revolt against Henry IV. We have already dealt with some passages from their writings in considering the theory of the relation of authority to justice, but we must look again at some of these, and consider them from the standpoint of their constitutional theory.

According to the account of Lambert of Hersfeld, the demands of the Saxons and Thuringians in 1073 were, first, that Henry IV. should do justice to the Saxon princes, whose possessions, as they said, he had seized without judicial process, in accordance with the judgment of the princes of the kingdom ; secondly, that he should dismiss from his court the low-born persons by whose advice he had been governing, and should entrust the administration of the affairs of the kingdom to the princes of the kingdom, to whom the charge properly belonged ; and thirdly, that he should put away his concubines and abandon the vicious habits which had disgraced the royal dignity. If he would do these things they were prepared to serve him, but only as became free men in a free empire.¹

As we have already said, we are not discussing the question of the real nature of the causes which lay behind the revolt of the Saxons, and we think that the sentiments or motives attributed by Lambert and the other historians to the revolters must often be taken rather as those of the writers than of those into whose mouths they are put. We are concerned with the theory which the great conflicts brought out rather than with the conflicts themselves, and the passage just cited represents two constitutional principles of great importance. First, that the king has no arbitrary power, but that there is a legal authority in the State to which he and all others must submit; and secondly, that the great affairs of the State are not to be administered by him at his capricious pleasure, but only through those who have a constitutional right to be consulted.

The principles which are thus expressed in relation to the beginning of the great revolt are constantly repeated during the conflicts which followed. Lambert represents even those who belonged in a measure to the royal party as admitting their validity. In the speech which he attributes to Berthold, formerly Duke of Carinthia, Berthold admits the justice of the complaints of the revolters, but begs them to consider the reverence which is due to the royal majesty, and urges that they should lay aside their arms and agree upon a meeting to which the king should summon the princes of the whole

kingdom, at which he might clear himself, before the common judgment, of the charges made against him, and might set right whatever should need correction.¹

It was indeed this constitutional conception, that the king was in the end responsible to the judgment of the princes of the kingdom, which was maintained throughout the long struggle between Henry IV. and those who revolted against his authority. They maintained steadily that it was for the council of the princes of the kingdom to decide upon the justice or injustice of the charges brought against Henry, and that it was in their power, for sufficient reasons, to declare the throne vacant. Lambert represents Rudolf of Suabia as refusing in 1073, at the meeting between the Saxon princes and those of the royal party at Gerstengen, to be made king, until the matter had been considered by a council of all the princes, and it had been decided that this could be done -without involving them in the guilt of perjury.¹

It is true that when once the great dispute between Henry IV. and Gregory VII. had developed, and when in 1076 Gregory had formally excommunicated Henry, the revolvers, as reported by Lambert, eagerly seized upon this new circumstance, and proposed to refer the charges against Henry to the Pope, who was to be invited to attend a council of all the princes at Augsburg, and, when all parties had been heard, to pronounce judgment upon them. They also decided that if Henry was not released from his excommunication within a year, they would no longer recognise him as king.²

In our next volume we shall have to examine the whole question of the principles of the papal intervention, here we need only observe that it greatly strengthened the hands of those who were already in revolt against Henry. The revolvers would evidently have been glad to put the whole responsibility of Henry's deposition upon the Pope, and indeed at the council of Forchheim in 1077, as Berthold of Constance reports it, they at first assumed that the Pope had finally deposed him, but the Pope's legates seem to have made it clear that this was not so—presumably on account of Henry's absolution at Canossa early in the same year—and intimated that it was for the council to judge and to determine upon their action. It was the princes therefore who declared him to be deposed, and elected Rudolf of Suabia.¹ It soon, however, became clear that there was still a strong party which supported Henry, and Berthold represents the chief men of both parties as agreeing later in the same year that the principal men of the kingdom should meet, and along with the legates of the Pope should consider what should be done, and as determining that they would by common consent repudiate whichever of the kings should refuse to accept their judgment, and would acknowledge and obey the other.²

We find another very significant assertion of this principle, that there was in the community an authority which could sit in judgment even upon the supreme ruler and upon his actions, in the last stages of Henry IV.'s tragic reign. In his despair, when he had been overwhelmed by the union of his son Henry V. with his opponents, he wrote, as is reported by Ekkehard, to the bishops and princes of Germany appealing to them against his son's conduct towards him. They replied inviting him to lay his case before the princes and the people, that he might receive and render justice, and that by the due consideration and just settlement of all the causes of discord, the Church and the kingdom might be restored to security.¹

The claim was indeed far-reaching, and if it stood alone might hardly deserve serious consideration, but as a matter of fact it is only a clear statement of the theory which was represented throughout the reign of Henry IV. And it did not disappear with his death.

We find a close parallel to it some years later in a document which belongs to the last stages of the investiture controversy, to the year before the settlement of Worms. This is a statement of the conclusions arrived at in a council of the princes held at Wurzburg in 1121. The emperor is to render obedience to the apostolic see, and to make peace with the Pope by the advice and help of the princes, under such conditions that the emperor shall have that which belongs to him, and the churches also shall possess their own in peace and quiet. The princes propose to devise a settlement of the dispute concerning investitures. If the emperor under any advice or influence should take hostile measures against any one on account of this, the princes, acting under his own authority and consent, determine that they will act together and admonish him not to do this, and, if he should neglect their advice, the princes will abide by the faith which they have pledged to each other.¹

It is no doubt difficult to measure precisely the reality and value of principles which are put forward in periods of violent controversy and civil war. But in this case we can recognise with confidence that the principle that the ruler is not an arbitrary or irresponsible master of the State, but must govern in accordance with the counsel and judgment of others whose duty it is to see that justice is done to the whole community, was firmly held apart from the mere passion of revolt, and that the stress and pressure of civil conflict only brought out into clearer view conceptions which had always been present and powerful.

It is then from this standpoint that we can profitably examine the political theory of Manegold of Lautenbach, by whom the conception of the limitations and conditions of the royal authority was most clearly and sharply set out. In order to deal adequately with his position we must not consider only a few isolated phrases, but must endeavour to make clear to ourselves the logical structure of his theory.

It would be to fall into a complete and deplorable confusion if we were to think that Manegold denied or doubted the sanctity and the divine authority of secular government. On the contrary, as we have already pointed out,¹ if he attacks its abuse, it is in the name of the greatness and the august nature of the office of the king. The royal office, he says, excels all other earthly authorities, and therefore the man who is to administer it should excel all other men in wisdom, justice, and piety, for he who is to have the care of all, to govern all, should be adorned with greater virtue than others, that he may be able to exercise the powers entrusted to him with the highest equity.² Again, in defending the right of the opponents of Henry IV. to use violence in resisting him, he urges with great force that the authority of the State in punishing transgressors is a part of the divine order.³ He does not doubt the truth of the words of St Peter, "Be subject to the king as supreme," and "Fear God, and honour the king," but only argues that they have been misapplied, for the title of king is a description not of a personal quality, but of an office, and obedience is due to the office, not to a man who has been deposed from it.⁴ Wenrich of Trier had urged against Hildebrand that Ebbo the Archbishop of Rheims had been deprived of his see for taking part in the deposition of Louis the Pious, in the ninth century, and Manegold admits that this was just, because it was done without due process and for unjust reasons.¹

Manegold, that is, recognises fully and explicitly the august and sacred nature of political authority and its function in maintaining justice and equity. But, on the other hand, he refuses to admit that this means that the authority of the ruler is absolute, or

that he is irresponsible and irremovable, and with characteristic boldness he attacks the tradition of the absolute divine right of the ruler in its most august source. Wenrich of Trier had, as we have already seen,² urged the words and the example of Gregory the Great as showing that even the popes, and even in matters which concerned religion, had felt themselves bound to obey the commands of the emperor even when they thought them wrong. Manegold meets this first by suggesting that the words of Gregory are susceptible of another interpretation ; but he does not hesitate to maintain that if indeed Gregory meant what was thought, and acted as he was understood to have done, his words and actions were wrong and must be repudiated.³ Manegold was clearly prepared to refuse to accept any authority however august which would impose the yoke of an unlimited obedience upon the subject.

It is with the same courage that he deals with the question of the binding nature of the oath of allegiance. Wenrich had made a vigorous attack upon the action of Hildebrand in absolving the subjects of Henry IV. from their oath of allegiance.¹ Manegold answers him not so much by urging the papal authority in this matter as by examining the nature of such an oath and the conditions of its obligation. This, he says, is the superiority of human nature to that of the animal, that in virtue of the power of reason it examines the causes of things, and considers not merely what should be done, but why it should be done. No man can make himself king or emperor, and the people elect a man to this position in order that he may protect the good and destroy the wicked, and administer justice to every man. If he

violates the agreement under which he was elected, and disturbs and confounds that which he was to set in order, the people is justly and reasonably absolved from its obedience, since he has broken that faith which bound him and them together. The people never binds itself by an oath to obey a ruler who is possessed by fury and madness.¹

There are, Manegold points out, two cases which have to be considered, that of the man who takes a just and reasonable oath to the king, and that of him who takes an unjust and unreasonable oath, and he examines the two cases separately. He who takes a just and reasonable oath to the king swears that he will be his companion and helper in maintaining the government of the kingdom, in preserving justice and establishing peace, and this oath is binding so long as the king demands his help in doing those things which he has sworn to do. But if the king ceases to govern the kingdom, and begins to act as a tyrant, to destroy justice, to overthrow peace, and to break his faith, the man who has taken the oath is free from it, and the people is entitled to depose the king and to set up another, inasmuch as he has broken the principle upon which their mutual obligation depended. This, Manegold maintains, is what the German princes had done ; they had perhaps sworn allegiance rashly when Henry IV. was too young to understand the nature of an oath, but they had striven to keep their oath, until he threw aside his obedience to the apostolic see, and forced them to apostatise from the Christian religion. When for this crime the Synod of Rome had deposed him, and deprived him of the royal dignity, the Christian people no longer owed him any reverence. It was the proper function of the apostolic see to reassure the people, which was concerned and anxious about the obligation of the oath it had taken, and it is therefore clear that it justly loosed the oath which was certainly and manifestly null and void, and publicly annulled that which was inherently invalid.¹

The discussion of the second case, that of the man who has sworn to do something in itself evil and unjust, does not demand any detailed consideration. Manegold urges, and supports his contention with a number of patristic quotations, that such oaths are obviously from the outset null and void.²

It should be observed that Manegold's treatment of the real nature of the authority which was exercised, when a man was absolved from the obligation of an oath, was not in any way peculiar or eccentric, but represents what was probably the normal conception of the canonists.¹ We are not here dealing with the claim of the ecclesiastical or papal authority to have the power of deposing kings ; with that we propose to deal in the next volume, and we shall then have to consider the treatment of this subject by Manegold. In the meanwhile we must observe that his contention that the oath of allegiance is not binding to the king who abuses his authority is really independent of this. In his opinion the Pope merely declares that obligation annulled which is already null and void.

We can now approach the consideration of that well-known passage in which Manegold sets out his theory of the nature of political authority and obligation in the sharpest and clearest terms. We have already indeed cited the first words of the passage, the words in which he expresses his judgment of the greatness and dignity of the royal office, and of its high moral function in maintaining justice.² The royal dignity excels all earthly authority, and he who is to hold it, who is to have the care and government of all, should be superior to all in virtue, that he may exercise this power with the highest equity. So far we have already followed Manegold's argument, but suddenly he turns to the other side of the principle. The people does not exalt him in order that he should act as a tyrant towards them, but in order that he should defend them from the wickedness and tyranny of others. If he, who has been elected to put down the wicked and to defend the good, turns to wickedness, oppresses the good, and plays the part of a tyrant over his subjects, it is clear that he justly falls from the office which was conferred upon him, and that the people are free from his dominion and from their subjection, inasmuch as he has violated that agreement (*pactum*) in virtue of which he was appointed. The people cannot in such a case be accused of a breach of faith, for it is he who has first broken faith.

And then Manegold, with characteristic audacity, reinforces this principle by a comparison from humble life. If a man has given his swine for a suitable wage into the charge of a swineherd, who, in place of keeping them safe, steals, slays, or loses them, he will refuse to pay the wage, and will dismiss him from his service. If this is just in such humble matters, how much more is it clear and just that the man to whom the rule of men has been committed, and who uses his power not for the true government of men, but to lead them into error, should be deprived of all power and dignity. This principle is surely right in Christian times, for even the Romans drove out Tarquin for the outrage which his son had committed against Lucretia. It is one thing to reign, it is another to act like a tyrant, and, while men should render faith and reverence to kings and emperors in order to maintain the true government of the kingdom, yet, if they play the tyrant, then they deserve neither faith nor reverence.¹

We have in this passage not only the summary of the political conceptions of Manegold himself, but the crystallisation of a movement of political thought and principle into a great phrase. For when Manegold represents the relation between the king and the people as embodied in an agreement or "*pactum*," a contract binding equally upon each

party, he is not only giving the first definite expression to the conception which came in later times to be known as the theory of the "social contract," but he is summing up in one phrase the main principle of mediaeval political society. This conception is the same as that which finds its classical expression in the phrase of the "Declaration of Rights" that James II. had broken the original contract between the king and the people, and it is also the expression of the mediaeval principle of the relation of the king to the law and the administration of justice. It is, indeed, of the first importance to observe that Manegold's conception is not constructed upon some quasi-historical conception of the beginnings of political society, but rather represents in concrete form the constitutional principle of the mediaeval state as embodied in the traditional methods of election or recognition, and of the reciprocal oaths of the coronation ceremonies. The people have indeed sworn obedience, but their oath is related to and conditioned by the oath which the king has at the same time taken to administer justice and to maintain the law. It is in virtue of this that he has been elected or recognised, and it is these reciprocal oaths which constitute the contract. The oath of the people is indeed "ipso facto" null and void if the king does not on his part faithfully observe the obligations which he has taken. Men do not undertake so great an obedience except for reasonable causes, and it is not reason to think that they are bound to obey one who refuses to recognise the principles and conditions in virtue of which they promised obedience.

It is no doubt true that the phrases of Manegold are related to a period of great confusion and civil war, and if they stood alone they would represent at the best an interesting and important anticipation of later developments of political principle or theory. But they do not stand alone, there is indeed no other writer of the eleventh or twelfth centuries who expresses the principle in exactly the same phrases, but the principle expressed by his phrases is the normal principle of the political theory of these centuries.

CHAPTER VH.

THE CONCEPTION OF A UNIVERSAL EMPIRE.

WE have endeavoured to set out the main aspects of the theory of political authority in the eleventh and twelfth centuries, and we have so far made no distinction between the theory as it may have been related to the empire and the other Western states. We do not indeed find any reason to think there was any substantial distinction ; on the contrary, the principles of political organisation appear to us to have been substantially the same in all the European communities.

There is, however, one conception which has been thought to have been important in the theory of the structure of mediaeval society with which we have not dealt, and this is the conception of the political unity of the world. It has been sometimes thought that as the Middle Ages present us with a unified ecclesiastical system under the headship of the Pope, so, at least in principle, they represent a unified political system under the headship of the emperor. There is, indeed, no doubt that at least in the fourteenth century, when abstract political theory was very highly developed, many writers, of whom Dante was the most illustrious, were much occupied with this conception, and it might well be supposed that this represents the natural survival of the impression of the great attempt of Charlemagne to gather together into one the divided members of the ancient Roman empire.

It is indeed clear that the conception of the one empire embracing and including all lesser states, and claiming some indeterminate superiority over them, was from the first frequently held among the people of the empire which the Ottos built up in the tenth century, and that they conceived of the position of the Itoman emperor as being something different from that of a German king. The expeditions to Italy represented the claim not merely to political authority in Italy, but to the succession of Charles the Great and of the ancient empire.

This is the conception which is represented in the Annals of Quedlinburg. They speak of the consecration and coronation of Otto III. in 996 as being done with the acclamation not only of the Roman people, but of the people of almost all Europe.¹ And they enlarge these phrases, and make them even more emphatic in describing the position of Conrad II. (the Salic). They speak of the chief men of all Europe and the envoys of many peoples as hastening to his court,² and of the emperor as one to whom all parts of the world bow the neck.³

The author of the life of St Adalbert, writing probably about the end of the tenth century, uses a phrase which serves well to illustrate the conception of the emperor as supreme lord of the world. He speaks of Rome as the head of the world, and says that Rome alone can transform kings into emperors. It is Rome that keeps the body of the Prince of saints, and it is right therefore that the lord of the world should be appointed by Rome.⁴ Berno, the Abbot of Reichenau, in a letter to the Emperor Henry II., addresses him as his lord, the propagator of the Christian religion, Emperor and Augustus, the lord both of lands and sea, and gives thanks to God, who has made his magnificence excel that of all kingdoms.¹ And Wippo, in his panegyric on Henry III., says : "Thou art the head of the world, while thy head is the ruler of Olympus, whose members thou dost rule with the just order of the law." ²

Such are some of the phrases used by the earlier writers as expressive of the conception that in some sense the emperor was lord not merely of the German and Italian kingdoms, but of Europe and of the world. And the tradition was not lost, but continued throughout the Middle Ages. Thus St Peter Damian, in the second half of the eleventh century, in his treatise on the disputed election of Alexander H. and Cadalous of Parma, adjures the royal counsellors and the ministers of the Apostolic See to labour together that the "summum sacerdotium" and the Roman empire may be united in alliance with each other, and that the race of men which is ruled by these two may not be divided.³ And in a letter addressed by him to Henry III. he speaks of all the kingdoms of the world as being subject to his empire.¹ Again, we may notice how, in a treatise ascribed to Cardinal Beno, in the last years of the eleventh century, Hildebrand is vehemently censured for applying certain words of St Gregory the Great to the emperor, as though there were no difference between him and any "provincial" king.²

It is thus that when the empire reached its highest point under Frederick I. (Barbarossa), we find a frequent recurrence of phrases indicating the notion that the Empire was superior to all other States, and even in some sense supreme over them. Thus Frederick uses of himself a phrase which might seem to be a claim to universal authority. In the introduction to a document of 1157 he styles himself "Frederick, by the grace of God emperor and always Augustus," and says that he holds by the Divine providence "Urbis et Orbis gubernacula." ³ Again, in a document relating to the enfeoffment of the Count of Provence, he speaks of the dignity of the Roman empire as

having a more excellent glory and greatness than all other kingdoms, authorities, or dignities, as it is adorned by the greater number and merit of its illustrious princes and wise men.⁴

It is, however, in one of the documents relating to the Council of Pavia (1159-1160) that the imperial claims are most forcibly expressed. On the death of Hadrian IV. there had been a double election to the papacy, and both Alexander III. and Victor claimed to have been duly elected. Frederick maintained that in such a circumstance the emperor had the responsibility of taking the proper steps to prevent a schism, and he therefore called together a council at Pavia to inquire into the matter and to decide which of the two claimants had a just title. It is in the letter of invitation to the German bishops that he uses the strongest phrases about the position and dignity of the empire. When Christ, he says, was content with the two swords, this pointed to the Roman Church and the Roman Empire, for it is by these two that the whole world is ordered in sacred and human things. For as there is one God, one pope, one emperor, there must be one Church. And thus it is the Roman emperor who must take measures to provide a remedy for this great mischief. He has therefore called together an assembly of the bishops of the empire, and of the other kingdoms, France, England, Spain, and Hungary, in order that they should in his presence decide which of the claimants should lawfully rule over the universal Church.¹

We are not here concerned with the question of the relation between the secular and the ecclesiastical authorities which was raised by this attempt to deal with the disputed succession to the papacy, we deal with Frederick's letter here only as illustrating his assertion of a special and unique position of the empire. If we were to take the encyclical letter to the German bishops alone, we might well think that Frederick definitely claimed that the empire stood above all other political authorities. When, however, we take account of the other documents relating to the Council of Pavia, we observe that his tone is somewhat different. His letter to Henry II. of England has been preserved, and it is noticeable that in this the more pretentious phrases about the position of the empire are omitted, and that he confines himself to the invitation to send as many of his bishops and abbots as possible to the meeting at Pavia, that they may assist in restoring the peace of the Church.¹ And in another of these documents, a letter addressed to the Archbishop of Salzburg asking him to postpone his recognition of either of the claimants to the papacy, he tells him that he has entered into communication with the Kings of France and England, and asked them also not to accept either of the claimants unless he had been recognised by them all.²

There is, however, a passage in a letter of Henry II. to Frederick I. cited by Rahewin, which seems to recognise the superior authority of the emperor in a very large sense ; he speaks of the emperor as having the right to command, and assures him that he will not fail in obedience.³ And Roger of Hoveden relates that Richard I. of England being a prisoner in Germany, and in order to procure his release from captivity, handed over his kingdom of England to the Emperor Henry VI., "as to the Lord of all," and that the emperor then invested him with it on the terms of the payment of an annual tribute.¹ He adds that the emperor released him from this on his deathbed, but he also mentions that Richard was summoned in virtue of his oath and faith to be present at Cologne in 1197, as being a chief member of the empire, to take part in the election of Henry VI's successor, and that he sent envoys to represent him.²

It is difficult to say what credit is to be attached to this story ; if it is true, it has to be observed that Richard was acting under compulsion. But it is possible that there may be some confusion about it, as Richard was at the same time invested, according to Hoveden, with the nominal kingdom of Arles by Henry VI.³ There may be some confusion, and it is possible that it was in this connection that he was summoned to the election.

Such are some of the most important illustrations of the survival in the eleventh and twelfth centuries of the conception of the emperor not only as holding a position and authority different from that of all other rulers, but as in some sense the supreme lord of a united world, as representing the conception of a political unity of the civilised world. It must be observed that with the exception of the last passages, all of these phrases represent the opinion or feelings of those who were emperors, or members of the empire. When we turn to the consideration of the question how far the sentiments of men in other western countries corresponded with them, we find ourselves in a somewhat different atmosphere.

There has survived a very significant letter written in 988 by Gerbert (afterwards Pope Sylvester II.), in the name of Hugh, King of France, to the Emperor of Byzantium, which indicates very clearly the attitude of the newly established kingdom of the Western Franks. It is possible, indeed, as M. Havet has suggested, that the letter was never actually sent, but it is hardly the less significant. It expresses the desire for close and friendly relations, and, in order that these may be secured, proposes a marriage between Robert, the son of the French king, and the daughter of one of the emperors, and assures them that the French king will resist any attempt on the part either of the "Gauls" or the "Germans" to attack the Roman Empire.¹ It is no doubt very probable that the project of a matrimonial alliance with Byzantium was suggested by the marriage of Otto II. with Theophano, and that the letter may represent nothing more than a project of Gerbert's for the glory of the French kingdom. But the recognition of the Easterns as rulers of the Roman Empire, and the undertaking to defend it against a possible attack on the part of the "Germans," are very significant of the attitude of the French kingdom.

In a curious poem by Adalbero, Bishop of Laon, there are some lines which seem to assert the dignity of the French kingdom and its independence.² In a letter of William, the Abbot of St Benignus, at Dijon, addressed as has been thought to Pope John XIX. (1024-1033), he asserts that the Roman Empire, which once ruled over the whole world, is now broken up, and is ruled by many kings, and that the power of binding and loosing in heaven and earth belongs to the jurisdiction of St Peter.¹ We are not now concerned with the ecclesiastical question, but the emphatic assertion of the contrast between the unity of the ecclesiastical authority and the fragmentary and divided nature of political authority is very noteworthy. And again, while as we have seen St Peter Damian in some places speak as though the world was united under the rule of the one emperor and the one Pope, in another work he expresses himself very differently, and contrasts the one Pope who rules over the world with the many kings whose authority is limited to their particular territories, and explains that this is the reason why the death of the Pope is notified throughout the world, while there is no reason why the death of a king should be thus announced.²

There is then some evidence that the idea of the unity of the world continued to influence men's thoughts and expressions, that the tradition of the universal empire of Rome, and the great unity of the Carolingian empire was never wholly lost, and that from

time to time it was asserted by emperors, or those who were under the imperial rule. On the other hand, we find occasional statements which seem to repudiate the conception of a unity of political control, and we can find no examples of any attempt seriously and practically to assert this. This does not mean that there was no conception of a unity of the Christian

and civilised world. We shall have to consider this more carefully when in our next volume we endeavour to deal with the question of the relation of the spiritual and temporal powers.

It is important to observe that, although there has been preserved a great mass of political writing of the eleventh and twelfth centuries, it is only in a few incidental phrases that we find any trace of the conception of a political unity of the world. It is not till the latter part of the thirteenth century, or rather till the fourteenth century, that the conception of a universal empire takes an important and conspicuous place in political theory—that is, not until it had ceased to have any relation to the actual political circumstances of Europe. What may have been the conditions under which the idea of political unity became important, just when the actual development of the modern nationalities was rendering it practically impossible, we cannot at present consider, though we hope that we may be able to deal with this later.

The truth is that, if we are to be in a position to consider this whole question seriously, we must begin by taking account of the actual trend and movement of European civilisation during the Middle Ages. As soon as we make the attempt to do this we shall recognise that the most important aspect of the living growth of the centuries, from the tenth to the sixteenth, was the development of the great nationalities of Europe out of the chaotic welter of incoherent tribes. For a moment these had been united by Charles the Great under the Frankish lordship, but the unity was merely artificial and apparent. Once his great mind and strong hand was removed Europe fell back into confusion, and it was only slowly out of the complex of oppositions and sympathies that there arose the various European nationalities. The movement was thus both towards unity and towards division, unity within certain areas, and the political separation of these great areas from each other.

No doubt the position of the emperors and their relation to Rome gave them a place which was formally different from that of other European rulers, and it is probably true to say that few men would have doubted that this gave them a certain priority or precedence. But the position of the new monarchies was in the main that of independent states, recognising no authority over them but that of God. We are therefore driven to the conclusion that while the tradition of a universal empire was not dead in these centuries, and while in those parts of Europe which were closely connected with the Empire the conception was always more or less present to men's minds, it is yet impossible to recognise that during the eleventh and twelfth centuries the conception had any living part in determining either men's ideals, or the principles and theory of the structure of society.¹

CHAPTER VIII.

SUMMARY.

THERE are three great conceptions expressed in the political literature of the Middle Ages, so far as we have yet examined it. The first is the principle that the purpose or function of the political organisation of society is ethical or moral, that is, the

maintenance of justice and righteousness. We have seen in an earlier volume that this was continually and emphatically maintained in the political literature of the ninth century, and our examination of the general literature of the eleventh and twelfth centuries, and of the feudal law books to the thirteenth, has been sufficient to show that no one ever seriously questioned it. If there has been any doubt among modern scholars it has arisen from a misunderstanding as to the influence of St Augustine on the mediaeval theory of the state, and from a hasty interpretation of some phrases of Hildebrand.

No doubt there lay behind St Augustine's treatment of the state a real difficulty which had its origin in the fact that, as we can see in the later philosophical systems of the ancient world and in the Christian theory of life, men had become more clearly aware of the existence of characteristics of human nature and personality which cannot be adequately expressed in the terms of the political organisation of society. It is this new apprehension of the nature of human life which is struggling for expression in St Augustine's 'De Civitate Dei.' His apprehension is often profound, but the expression of it is sometimes crude and ill-considered. As we have seen in the first volume, St Augustine at times seems to deny to the

State as such the character of justice, though at other times he speaks in different terms.¹ But the difficulty is not to be measured by these hasty phrases of St Augustine. The difficulty lay in the fact that men had begun to apprehend that there are aspects of the moral and spiritual life which the coercive machinery of the state cannot adequately represent. This is no doubt the principle which lay behind the development of the conception of the independence of the spiritual power. It was conceived of as the embodiment of moral and spiritual ideals which could not be adequately represented by the temporal power. When the distinction was crudely conceived, the former was spoken of as being concerned with "divine" things and the latter with "secular." We cannot here discuss these questions adequately, we shall have to return to them when in our next volume we deal with the relations of the ecclesiastical and political powers in the Middle Ages. We can, however, recognise at once that behind the formal aspects of this question there lay great and profound difficulties, difficulties for which we have not yet found any complete solution.

It is necessary to recognise the existence of real perplexities for the mediaeval political thinkers. But, having done this, we must also recognise that the broad common-sense of these men refused to allow itself to be entangled in these perplexities to such an extent as to admit any doubt whether the State had a moral character and purpose. It is clear that no mediaeval thinker seriously doubted the moral function of the State, and that this moral function was the securing and maintaining of justice. Even when Hildebrand urged that the State had its origin in sin, he did not mean that the State was sinful. It may have been sin which made it necessary, but also it was the remedy for sin, the divinely appointed remedy for the confusion which sin produced, the means of curbing and restraining the sinful passions and actions of men.

This is the real meaning of the doctrine of the New Testament, and the Fathers, and of the Middle Ages, that the authority of the king is a divine authority. He is God's minister for

the punishment of the wicked and the reward of the good. It is true that here again a certain confusion had crept in, owing mainly to some rash phrases of St Gregory the Great, and, as we have seen, there were some even in the Middle Ages who were carried away by this tradition into the impossible theory that the authority of the king was in

such a sense divine, that he was responsible only to God, and that it was always unlawful to resist him even when his conduct was unjust and illegal. But again the robust good sense of the mediaeval political thinkers and the force of circumstances counteracted this influence. They believed firmly in the divine nature of the state, they looked upon the ruler as God's representative and servant, but only so far as he really and in fact carried out the divine purpose of righteousness and justice.

This, then, was the first principle of the political theory which we have been considering. And the second is closely related to the first, for it is the principle of the supremacy of law as the concrete embodiment of justice. Mediaeval thinkers upon politics were not disturbed by some of our modern perplexities, they were satisfied to regard the law of any society as the expression of the principle of justice for that society. It is very difficult for us to put ourselves back into the mood and temper of these times ; we look upon all legal regulations as being at the best reasonable applications of general principles which make for the wellbeing of human life, we look upon laws as the expression of the judgment of the legislative authority, representing more or less adequately the judgment of the community, and normally we recognise the laws as reasonable, though not necessarily the best possible ; we take them to be rules laid down by men yesterday or to-day, and perhaps to be changed to-morrow. Our difficulty is to make it clear that there ought to be, and to feel certain that there is, a real moral sanction behind them, and that they justly interpret the actual needs of society. To the men of the Middle Ages the law was a part of the local or national life ; it had not been made, but had grown with the life of the community, and when men began to reflect or theorise on the nature of law, they assumed that these customary regulations represented the principles of justice.

To the mediaeval political theorist then the supremacy of justice meant the supremacy of law, and though the expression of this conception by John of Salisbury is stronger and more systematic than that of most writers of the period which we have been considering, yet it does not really go beyond their principles. To them the conception of an arbitrary authority was simply unthinkable, the distinction between the king who governs according to law and the tyrant who violates it, was not a rhetorical phrase, but the natural and normal expression of their whole mode of thought.

And if we now compare the conceptions which are embodied in the general political literature with those of the feudal lawyers, we find that they are substantially identical. Indeed Bracton and the authors of the Assizes of the Court of Burgesses of Jerusalem speak as sharply and definitely as John of Salisbury. "There is no king where will rules and not law," "The king is under God and the law," "La dame ne le sire n'en est seignor se non dou dreit," these phrases are as unequivocal as those of John of Salisbury, and their doctrine is the doctrine of all feudal lawyers.

The third great principle of mediaeval political theory is again related to the others, and it is the principle that the relation between the king and the people is founded and depends upon the mutual obligation and agreement to maintain justice and law. We have considered the clear and somewhat harsh terms in which this is expressed by Manegold of Lautenbach. It may be urged that he represents an extreme position which was not generally approved,¹ but we must not allow ourselves to be misled into the judgment that the principles which he expressed were strange or unfamiliar. On the contrary, it is clear

that he was only putting into definite if hard form a principle which was generally assumed as that which determined the relations between subject and ruler. This is, we think, the conclusion

which must be drawn from the literature which we have just been examining, and our judgment is only confirmed when we turn to the strictly feudal literature. The feudal obligation may have once been conceived of as one of unconditional personal loyalty, but, as we find it in the feudal law books of the twelfth and thirteenth centuries, it is clear that this loyalty was limited and conditioned by the principle of the necessary fidelity of lord as well as of vassal to the mutual and legal obligations which each had undertaken.

Manegold may express the principle in one way, John of Salisbury in another, and the authors of the Assizes of Jerusalem in a third, but their meaning is the same. Manegold speaks of deposing the ruler who has broken his contract, John of Salisbury of the lawfulness of slaying the tyrant, the authors of the Assizes of refusing to discharge any of their feudal obligations to the lord who refuses to do justice to his vassal according to the law and the judgment of the court; the forms of expression are different but the principle is the same. The mediaeval conception of contract is not a speculation of a pseudo-historical kind, related to some original agreement upon which political society was founded, but rather a natural and legitimate conclusion from the principle of the election or recognition of the ruler by the community, and the mutual oaths of the ceremony of coronation ; it is an agreement to observe the law and to administer and maintain justice.

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VOL. IV.

THE THEORIES OF THE RELATION OF THE
EMPIRE AND THE PAPACY

FROM THE

TENTH CENTURY TO THE TWELFTH

BY

A. J. CARLYLE, M.A., D.LITT.

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PREFACE TO VOLUME IV.

IN this volume I have endeavoured to put together some detailed account of the theories of the relations of the Papacy and the Empire from the beginning of the tenth century to the latter part of the twelfth. I have not endeavoured to deal with the more general subject of the relations or oppositions of the ecclesiastical order and the secular. Some aspects of these have been already discussed in the first and second volumes of this work, and we shall probably return to them in the next volume ; but I should like to remind our readers that the subject of this work is not the history, either civil or ecclesiastical, of the Middle Ages, but the political theories, and we deal with the relations of the Temporal and Spiritual powers only so far as they seem to us to have tended to influence the development of these theories.

I do not indeed think that these relations had as much effect upon political theory in general as has been sometimes suggested. The great political conceptions of the Middle Ages, the supremacy of law, the authority of the community, the contractual relation between ruler and subject, were only incidentally affected by the question of the relations

of the two Powers. And yet I think that we are justified in devoting a whole volume to the conflicts of the Empire and the Papacy in the eleventh and twelfth centuries for two reasons. First, because the principle that human society was controlled by two authorities, a spiritual as well as a temporal, represents the development of what is one of the most characteristic differences between the ancient and the modern world. Second, because it has been sometimes thought that the principle of the independence of the spiritual life tended in the Middle Ages to become the principle of the supremacy of the Spiritual Power. I do not indeed pretend in this volume to deal with the whole of this subject; in the next volume we hope to deal with this in its development in the thirteenth century. I have endeavoured in this volume to consider how far the question arose in the great conflicts of the eleventh and twelfth centuries, and to arrive at some conclusions as to the nature and extent of the development of such a theory of supremacy during this period.

I wish to express my very great obligations to Mr Z. Brook of Caius College, Cambridge, who has read the proofs, and to whose corrections and suggestions I am most deeply indebted, though he is not in any way responsible for the final form of the treatment of the subject, or for the judgments which are expressed. I may be allowed to express the hope that it may not be long before his detailed studies of Gregory VII. may be made accessible to us all.

I wish to express my constant obligations to the masterly work of Professor Otto von Gierke, and especially to that part of it translated by the late Professor Maitland. Only those who have endeavoured to work through the mass of mediaeval literature can appreciate fully its monumental erudition, and the accuracy of even his most incidental references. I should also wish to express my admiration for Professor Mirbt's excellent and detailed study of the controversial literature of the eleventh and twelfth centuries, 'Die Publizistik im Zeitalter Gregors VII.' And I must remember with gratitude my obligations to the work of one of the most learned of our ecclesiastical historians of the Middle Ages, Professor Hauck of Leipzig, who has unhappily passed away in these troubled but heroic years.

A. J. CARLYLE.

PART I.

RELATIONS OF THE SPIRITUAL AND TEMPORAL POWERS FROM 900 A.D. TO 1076 A.D.

CHAPTER I.

THE OVERLAPPING OF THE SPIRITUAL AND TEMPORAL POWERS.

IN the first volume of this work, we endeavoured to consider the main principles and characteristics of the relations of the spiritual and temporal authorities in the ninth century, and we came to the conclusion that, while it was clearly apprehended that the principle which governed these relations was that each authority should be supreme and independent of the other within its own sphere, the relations were in fact very complex, and often appeared to be inconsistent with this principle. The Temporal power actually and continually possessed a great influence in the ecclesiastical sphere, while the Spiritual constantly exercised a great amount of control in temporal affairs. The principle was clear enough, but it was obviously very difficult to act in strict accordance with the principle. The emperor or king frequently found himself in the position of one whose duty it was to see that the ecclesiastical officers of the Church carried out their functions

rightly, and therefore actually exercised a large if undefined authority in ecclesiastical matters ; while, on the other hand, the spiritual authorities were frequently involved in the direction and ordering of secular matters.

The principles which men held were clear and apparently simple, but the actual relations of the two great authorities were very complex. It is, however, true on the whole to say that in spite of this complexity there was no serious collision or conflict between the two authorities.

In this volume we have to consider how it came about that these comparatively tranquil conditions were changed, and that for some two hundred and fifty years, from the accession of Pope Gregory VII. in 1073 till the death of Pope Boniface VIII. in 1303, Western Europe was almost stunned with the noise of the great conflict between the Empire and the Papacy, while in other Western countries the conflicts of the Temporal and Spiritual powers were, if not so sensational in their form, not less serious in their character. In this volume we do not propose to deal with the subject beyond the date of the accession of Innocent III. (1198), for which his pontificate these relations assumed a new form which must be considered in immediate connection with the conditions and theories of the thirteenth century.

We have to consider, first, how the great conflict came about; second, the actual nature of the questions and principles at stake in the conflict; and third, the nature of the solutions, partial or permanent, at which men arrived in the course of the twelfth century. And first we must consider how the great conflict came about, for certainly here, if anywhere in history, it is only through the consideration of the antecedents or causes of the situation that we can hope to reach any real interpretation of the situation itself. In order that we may do this we must therefore begin by considering the actual nature of the relations of the two great authorities, the spiritual and the temporal, in the tenth century and in the eleventh, until the accession of Pope Gregory VII. to the Papal See.

When we begin to examine dispassionately the history of this period we are impressed before all with the fact that, while there is no reason to think that any one doubted that the spiritual and temporal authorities were distinct and had each their own proper sphere,¹ in actual fact the temporal ruler and the laity in general did constantly take a large part in administering ecclesiastical affairs, while the Pope and bishops exercised a large amount of authority in political matters.

Throughout the tenth and eleventh centuries we find constant reference to the presence of secular princes and other laymen at Church councils as taking part in their deliberations, and giving their authority to their determinations. A good example of this is to be found in the proceedings of a council held at Augsburg in the year 952. The council was summoned by Otto I., with the advice of the bishops, for the consideration of spiritual affairs and the condition of the Christian Empire ; and the bishops specially invited his presence at the discussion of sacred matters. Otto is not actually represented as taking part in declaring the laws of the Church, but he was present while they were deliberated on, and it was to his support that the clergy looked for their maintenance.²

We can find numerous parallels to this in the tenth and eleventh centuries, not only in Germany but also in Italy. In the reports of various councils held during the pontificate of John XXI., it is said that the Emperor Otto I. was present and consenting ; ¹ and again in the account of a council held at Rome by Pope Gregory V., in the year 998, the Emperor Otto III. is represented as having taken an active part in the discussion of the question of

a contested election to the bishopric of Auxonne.² Again, Otto III. is spoken of as presiding along with Pope Gregory V. at the council held in Rome, at which the see of Merseburg was refounded and restored to its original dignity.³ The Emperor Conrad II. is said to have presided with Pope John XIX. at a council held in Rome in 1027 to determine the relation of Grado to the Patriarch of Aquileia, and the decision is described as being that of the Pope and the Emperor; the Emperor Conrad is also said to have presided at a council of bishops at Frankfort, at which a large number of the inferior clergy and laity were present.¹

Again, Henry IH. is said to have been present at a synod held at Pavia in 1046, and the decision of the synod with regard to the precedence of the Bishop of Verona is described as being in accordance with his “preeceptum.”² In the decrees of the Council held at Maintz in 1049 by Pope Leo IX., the Pope speaks of the Emperor Henry III. as sitting with him in the Council, and as giving his approval to the judgment of the Council with regard to a disputed claim to the archbishopric of Besangon. The inferior clergy and the laity are also mentioned as being present and signifying their approval.³

These passages will serve as illustrations of the fact that the kings or emperors of the tenth and eleventh centuries frequently took an important part in the proceedings of ecclesiastical assemblies. It is not less important to observe that the presence of other laymen is mentioned in the accounts of the Synods of Frankfort and Maintz, to which we have just referred, and it is worth while to notice some further illustrations of this. Pope Leo IX. in one of his letters refers to the decisions of the Council which he held at Rheims in 1049 as having been made by himself, with the advice of the bishops, and the assent and approval of the clergy and people.¹ A few years later, in a letter addressed by Pope Nicholas II. to the bishops of Gaul, Aquitaine, and Gascony, he describes the Council which he had held in Rome in 1059—the Council at which the famous new order for papal elections was made—as having been attended by bishops, abbots, clergy, and laity.² A few years later again, in 1067, we find a letter of Pope Alexander H. addressed to the clergy and laity of the Church of Cremona, inviting them to send representatives to a council which he proposed to hold after Easter.³ There is therefore nothing to surprise us when we find it stated in the life of Lanfranc, that the council for the revival of the canonical system and order of the Church in England was summoned by him with the authority of Pope Alexander and King William, and that it is described as being composed of the bishops and princes, the clergy, and the people.¹ The Synod or Council of Rome, held in the year 1076 by Gregory VII., at which the Emperor Henry IV. was excommunicated and declared to be deposed, is said to have been attended not only by the bishops and abbots and clergy, but also by the laity.² At the end of the eleventh century we find another example of the same thing in two letters of Pope Urban II. dealing with the question of the metropolitan authority of the Archbishop of Tours in Brittany; he announces his decisions as having been made in a council attended not only by bishops and other clergy, but also by the Roman judges and “consulars,” and by their advice.³

It might seem that these and similar phrases are not in themselves of much importance, and no doubt in many cases they are little more than formal; but this does not really affect their significance, for what they imply is this, that however

clearly men might maintain the principle of the separation of the two powers, and, of the two orders of clergy and laity, in fact the layman was not conceived of as completely excluded from the organised ecclesiastical authority.

If it is important to observe the fact that the temporal ruler and the laity in general were recognised in the tenth and eleventh centuries as having some place in the administration of ecclesiastical affairs ; it is not less important to take note of some passages in the writings of these times in which the Pope or other ecclesiastical persons are spoken of as having their place in the regulation of temporal matters. We shall have to consider later very carefully the exact nature of the claims made with respect to this when the great conflict had broken out, in the meanwhile we only desire to take note of some incidental references to the matter before that time.

We have pointed out in the first volume of the work that it was frequently recognised in the ninth century that the Popes and the bishops of the Church had a considerable authority in the appointment of emperors and kings.¹ As we have said, it is difficult to determine the exact principles upon which this was founded. In the case of the relation of the Pope to the appointment of an emperor, there were the special circumstances attending the recognition of the Frank rulers as Roman Emperors ; in the case of the bishops in general it is difficult to say how much was due to the respect for their spiritual office and authority, how much to the fact that the bishops were among the great men of the community to whom the selection and proposal of the ruler was normally entrusted. It is, indeed, very doubtful whether in the ninth century the various elements upon which the intervention of ecclesiastical persons in secular matters depended were clearly distinguished from each other, and it would seem that there is the same ambiguity about the matter in the period that followed.

In the last year of the ninth century we find some important phrases in a letter attributed to Hatto, the Archbishop of Mainz, and written to Pope John IX., with reference to the election of Louis, "the Child," as King in Germany. Hatto excuses the neglect to consult the Pope about the election, on the ground that the roads between Germany and Rome were blocked by the "pagans," and asks the Pope that, now that it was possible to communicate with him, he would confirm their action.¹ The letter implies clearly that the Pope was in such a sense recognised as having a place in the matter, that it was important to conciliate him, and to secure his approval and support. In the tenth century, and at the time of the deepest degradation of the Papacy, Pope John XH. speaks of Otto I. as having come to Rome that he might seek the imperial crown from St Peter by his hands, and proclaims that he had anointed him as Emperor for the defence of the Church, and with the benediction of St Peter.² Rodolphus Glaber, writing in the first half of the eleventh century, states very emphatically the principle that no one might be called, or could be, Emperor except he whom the Pope should choose as fit for such an office, and upon whom the Pope had conferred the Empire.³ The Continuator of the 'Annals of Hildesheim' speaks of Henry HI. as having made his infant son king by the election of the Roman Pontiff and the other bishops and princes.¹

Enough has been said for the moment to illustrate the extent to which in the tenth and eleventh centuries the two great authorities, the temporal and the spiritual, continued to overlap each other, and to show how often the temporal authority intervened in ecclesiastical matters, and the spiritual in secular. We must now consider in more

detail some of those questions in relation to which there finally arose the great conflict of the eleventh and the twelfth centuries.

CHAPTER H.

ELECTIONS TO THE PAPACY IN THE TENTH AND ELEVENTH CENTURIES.

IF we are to attempt seriously to understand the nature of the later controversies, we must begin by considering the part taken by the German Emperors, from Otto I. to Henry III., in the appointment and deposition of the Popes. We do not indeed pretend here to 'give an exhaustive or detailed account of all the circumstances of the papal elections during this period, and there is the less need of this, as there are several important monographs on the subject. We think, however, that it is possible to recognise certain important principles as generally admitted in this period, and we can also distinguish with sufficient clearness the most important points of doubt and controversy. It is clear on the one hand that throughout this period—that is, from the beginning of the tenth century to the accession of Gregory VII.—some place was recognised as belonging to the Emperor in the election of a Pope ; while on the other hand we can also see that there were grave doubts about the extent of the imperial share in the election, and about the attempt to assert jurisdiction over the Pope, on the part of any men, whether lay or clerical.

The tenth section of the proceedings of the Council held at Rome in the year 898, by Pope John IX., may be taken as representing the circumstances on which the place of the imperial authority in papal elections actually rested in the tenth century. It speaks of the violence to which the Roman See was exposed

on the death of a Pope, when the consecration of a successor was carried out without notice to the Emperor, and without the presence of his envoys, who should prevent the occurrence of violence and other scandals at the time of the consecration ; and it provides that for the future the elections should be made by the bishops and clergy on the proposal of the senate and people, that the Pope should be consecrated in the presence of the imperial envoys, and that no one for the future should extort from the Pope-elect any oath or promise except that which was in accordance with ancient custom, lest the Church should receive scandal, and the honour due to the Emperor should be diminished.¹

The document recognises that, while the election of the Pope belongs to the bishops and clergy, acting on the proposition of the Roman laity, the election should not be carried out to its completeness by consecration until the Emperor had been informed and his envoys were present; and the reason specially suggested for this is that without the protection of the Emperor the appointment could not be carried out in peace and freedom.

It is not our part here to attempt to appreciate in its complete historical significance the whole history of the condition of the Papacy in the tenth and the earlier eleventh centuries. It must suffice for us to recognise that when Otto I. came for the second time to Italy, and was crowned as Emperor by Pope John XII. in 962, he found the Roman See at a very low level, and under the control of the factions of the Roman nobles. John XII. crowned Otto as Emperor, but as soon as Otto had left Rome, began, as it was said, to conspire against him. Otto returned to Rome, and then, according to the statement of Luitprand, Bishop of Cremona, held a council in which there sat bishops from Italy, Saxony, Franconia, and the clergy and principal citizens of Rome. The Pope was accused of a variety of moral and ecclesiastical offences, and the council invited him to attend and

purge himself of these charges. John replied by threatening to excommunicate them if they endeavoured to appoint another Pope. After further negotiations, the Emperor addressed the Council, and complained that John had broken the oath which he had taken to him, and had conspired with his enemies against him. The clergy and people replied that such an unheard-of offence must be dealt with by unprecedented means, and that the Pope had injured not himself only, but others, by the profligacy of his conduct, and demanded that he should be deposed and another elected. The Emperor assented to their demand, and they, with one voice, elected Leo, the “ Protoscrinarius ” of the Roman Church, as Pope ¹ (964). It would seem, however, that the apparent unanimity of the Roman people and clergy was superficial, for when the Emperor left Rome, the people rose against Leo VIII., and he fled to the Emperor. Pope John X. died, and the Romans elected Benedict V. The Emperor returned, and Benedict was brought before the Council in the Vatican, and sent into exile in Germany.¹

In the next year (965) Leo VIII. died, and the account of the election of his successor, which is given by the Continuator of Regino’s Chronicle, is important. On the death of Leo, the Romans, he says, sent Azo, the Protoscrinarius, and Maximus, the Bishop of Sutri, to the Emperor, who was then in Saxony, to ask him to appoint whom he would as Pope. The Emperor, however, did not do this, but sent Otgar, the Bishop of Spire, and Liuzzo, the Bishop of Cremona, to Rome; and then, presumably in their presence, the Roman people elected John, the Bishop of Narni, as Pope.²

It would, be unsafe to conclude that this narrative presents us with a complete account of the whole circumstances : we must allow for the possibility that the statements may be coloured by the position of their authors.

The action of Otto I. and the Council in deposing Pope John XII. was parallel to the action of Henry III. and the Council of Sutri in 1049. There were precedents in the purgation both of Leo III. and Leo. IV. for some claim on the part of the Church and the Emperor to be concerned with the character of the head of the Church.¹ It is more important to observe that, whatever irregularity there might be in relation to the deposition of John XII., it seems clear that the traditional forms were carefully observed in the elections of Leo VIII. and John XIII. As Luitprand relates the matter, it was the clergy and people of Rome who elected Leo VIII., and the Emperor only gave his assent to their election. The narrative of the continuator of Regino seems clearly to imply that on the death of Leo V., Otto I. did not make any appointment to the Papacy by himself, but referred the election to the Romans, presumably in the presence and with the sanction of his envoys.

This agrees indeed with the provisions of the “ Privilegium ” of Otto I. with regard to papal elections, which is attributed to the year 962, and is thought to be substantially genuine.² In this, it is provided that the Roman clergy and nobility are to secure that the election was to be carried out canonically and justly, and that he who was elected to the Apostolic See was not to be consecrated until he had, in the presence of the imperial mission, made the same declaration as had been voluntarily made by Pope Leo ; and further, that no one was to interfere with the freedom of the Romans, to whom by ancient custom and to constitution of the holy fathers the right of election belonged—this prohibition extended to the missi of the Emperor.³ These provisions correspond with

those of the “ Pactum ” of Louis the Pious, and the “ Constitutio Romana ” of Lothair I.,¹ they clearly recognise that the right of election belonged to the Romans, while the Emperor retained an important place in the process.

A little later in the century we find that these constitutional traditions were no longer so carefully observed. The life of St Adalbert contains an account of the appointment of Pope Gregory V. in the year 996. From this it would appear that the Emperor Otto III. was at Ravenna when Pope John XV. died. The chief men of Rome (*proceres et senatorius ordo*) sent letters and messengers announcing the death of the Pope, and desiring to receive the royal judgment as to whom they should set up in his place. Otto III. selected Bruno, a young and learned clerk of the royal chapel, who was his kinsman, and he was elected *a maioribus*, apparently at Ravenna, and was then sent, with the Archbishop of Mainz and another bishop, to Rome, where he was received with honour.² The procedure is much of the same kind as that of which we shall find examples when we come, in the next chapter, to deal with the appointment of bishops.

In a document of a few years later, whose genuineness has indeed been disputed, but probably without sufficient reason, we find Otto III. claiming very explicitly that it was he himself who had created Gerbert (Silvester II.) Pope in the year 999.¹ How much exactly this may mean it is not easy to say, but at least it implies that Otto III. had a very high conception of his own share in the appointment.

We have very little by way of contemporary observation and criticism on the events which we have recorded ; but it is important to observe that Thietmar of Merseburg, writing not later than the first quarter of the eleventh century, expresses his disapproval of the deposition of Benedict V., whom he calls “ *valentior sibi* [i.e., the emperor] in Christo,” and maintains that no one had authority to judge him except God Himself.²

After the death of Otto III. the Papacy was comparatively free from the pressure of the Empire, but also it lost its support, and once again it fell on evil days, for, if it was emancipated from the interference of the Germans, it only fell more helplessly under the domination of the local factions, and by the middle of the eleventh century the situation had once again become acute. We do not need to enter into the details of the intervention of Henry III. ; it is enough for us here to remember that Gregory VI. was deposed at the Council held in the presence of Henry III. at Sutri in December 1046, and that Suidger, the Bishop of Bamberg, was elected to the Papacy as Clement II.¹

It need not be doubted that the action of Henry III. was well intended, and indeed it succeeded in producing a reformation of the conditions and character of the Papacy which had permanent effects. The question of the propriety of the methods used is another matter.

Clement II. died in 1047, while Gregory VI. was still alive. Among the most highly respected bishops of the Empire was Wazo, Bishop of Lige, of whom we shall have more to say later. Henry III. asked his advice about the appointment of a successor to Clement; but Wazo, as reported by his biographer, replied with great courtesy but with great firmness, warning Henry III. against proceeding to any appointment while the legitimate occupant of the Holy See was still alive, and urging that it was the clear doctrine of the holy fathers that no one could judge the Supreme Pontiff but God Himself.² It appears

that Wazo's reply did not reach Henry III. till after Poppo of Brixen had been appointed Pope as Damasus II., but his judgment is very significant.

What Wazo expresses firmly but in cautious and moderate language was expressed much more roughly in an apparently contemporary work of a French Churchman. He denounces the emperor as most wicked, and challenges him to consider how contrary was his action in venturing to sit in judgment upon an ecclesiastic to the example of former emperors and kings. He even suggests that Henry III. was not fit to judge even laymen on account of what he calls his incestuous marriage with Agnes of Poitou, who was his kinswoman. He maintains that as the layman confesses to the priest, the priest to the bishop, and the bishop to the Pope, so the Pope confesses to God only, to God who had reserved him to His own judgment. The emperor, he exclaims indignantly, does not hold the place of Christ, but rather of the devil, when he uses the sword and sheds blood.¹ It is also significant that he protests against the election of the Pope as having been carried out without the counsel and consent of the French bishops, and contends that as they had no share in the election, they were not bound to render obedience.²

The attitude of Wazo and of the French writer is very significant, and represents the same principle as that which, as we have seen, was expressed earlier in the century by Thietmar of Merseburg. We must, however, observe that the condemnation of Henry's action does not seem to have been shared by important members of the reforming party in the Church. The most eminent Italian representative of reform was Peter Damian, and it is clear that he had the highest opinion of Henry III. and of the services which he had rendered to the Church, especially in attacking the simoniacal practices which were already so prevalent in it. In a treatise written during the pontificate of Leo IX. he even says that it was specially due to his services in this respect, that the divine dispensation permitted that the Roman Church should be ordered according to his will, and that no one should be elected to the Apostolic See without his authority.¹

Another of the most eminent reforming prelates of this period, Humbert, Cardinal of Silva Candida, in his treatise, 'Adversus Simoniacos,' refers in the warmest terms to the great service Henry III. had rendered to the Church by his action against simony.¹ And, it should be observed, that even Gregory VII. refers in the highest terms to Henry III., and speaks of him and his wife with great admiration.²

It is at least clear, from the consideration of these divergent opinions, that even those who were most zealous for the reformation of the Church were by no means fully agreed in their judgment upon the action of Henry III. at Sutri.

The question of the right of the emperor to some share in the appointment of the Popes was in some respects different. It does not appear that any one had so far seriously questioned the propriety of the emperor having some part in this, but the nature of that part was uncertain. We must now briefly consider the history of the question from the time of the Council of Sutri down to that of Pope Nicholas II. and his decree with regard to the method of papal elections.

Henry III. had received at Rome the title of "Patricius," and as some writers seem to suggest, this carried with it some special authority in the election of a Pope.³ As we have seen, Clement II. died in 1047, the year after his appointment, and Poppo of Brixen was appointed as Damasus II. by the emperor and his court in Germany, apparently before Wazo's letter, deprecating any election while Gregory VI. was alive, had reached the emperor. When, however, Damasus II.

died in the same year, it became evident that the question of the right method of electing the Pope had begun seriously to affect the minds of men. We have more than one account of the election of Bruno of Toul as Leo IX. The first of these, which is contained in the history of the Church of Rheims by Anselm, relates how, on the death of Pope Damasus II., the Romans announced this to Henry III., and asked that he should appoint another in his place. The emperor, having consulted the bishops and “optimates” of the Empire, selected Bruno of Toul, a man distinguished for his character and learning and a kinsman of his own. The “insignia” of the Apostolic dignity were adjudged to him, and he was sent to Rome “ad haec secundum ecclesiasticas sanctiones suscipiendas.” On his arrival there he was received with honour by the Roman people, and enthroned in the chair of St Peter as Leo IX.¹

In the life of Leo IX., however, which was written by Wibert, who had been Archdeacon of Toul under him, we have a great deal of additional and highly significant detail. The author represents Leo as being elected in the presence of the Emperor Henry III. at Worms by a council of the bishops and proceres. He demanded three days’ time for consideration, and spent them in fasting and prayer, and then declared his readiness to accept the office, but only on the condition that he should be assured of the consent of the whole clergy and people of Rome. He drew near to Rome walking on bare feet, and when he reached the city he announced the imperial election, but demanded that they should declare their will,

whatever it might be, protesting that according to the canons the election of the clergy and people must precede all other authority, and assured them that he would gladly return to his home if they were not pleased to elect him. It was only when he saw that they unanimously acclaimed him that he finally consented to be enthroned.¹ We must, perhaps, allow for the possibility that the narrative may be, to some extent, coloured by the principles of the writer, but even when we make allowance for this it remains very significant. It does not seem to have been denied that the emperor should have some voice in the appointment of the Pope, but he could not neglect or override the rights of the clergy and people of Rome as the primary electing body.

The appointment in 1054 of the successor of Leo IX., Gebhardt, Bishop of Eichstadt (Victor II.), is described in somewhat different terms by different authorities, but it seems clear that the election was made by the emperor himself, with the advice of his bishops and court, and with the consent of the representatives of the Roman Church.²

There is no trace of any consultation of the imperial court in relation to the election of Stephen IX. (1057), but on his death in the following year the aristocratic factions in Rome endeavoured to reassert themselves, and procured the election of the Bishop of Velletri as Benedict X. The cardinals, however, refused to recognise him, and with the sanction of the imperial court proceeded to elect Nicholas II. at Siena. It was no doubt this attempt of the Roman factions which led Nicholas II. to promulgate his famous decree for the regulation of the method of papal elections in April 1059. The most important provisions of this are—the primary place given to the cardinal bishops and the other cardinals in the election : the permission in case of necessity to proceed to the election of a Pope outside of Rome, who should exercise the full authority of the Papal See, even if he could not at once be enthroned in Rome ; and, finally, the recognition of the relation of Henry and his successors to the election. The phrases are vague, but certainly

seem to imply that in normal circumstances they were to have a legitimate place in the process of the appointment of a Pope.¹

CHAPTER IH.

THE APPOINTMENT OF BISHOPS TO 1075.

IN the first volume of this work we have endeavoured to point out briefly the principles which were generally recognised in the ninth century as governing the appointment of bishops in the Carolingian Empire. We have stated our own conclusion that it was held that a proper appointment normally included a number of different elements—the election by the clergy and people of the diocese, the approval of the comprovincial bishops and the metropolitan, and the consent of the prince, and that it was generally recognised that no one of these elements should be neglected.¹ No doubt the practice of the time was often a little uncertain, but the principles acknowledged were clear, and there was no serious dispute about them. We have now to consider briefly the history of the question until the time, i.e. 1075, when the great dispute about episcopal appointments broke out between the Papacy and the Empire. It is indeed necessary to consider this with some care if we are to understand the real nature of that great conflict and to do justice to the various points of view represented in it, and if we are to escape from that vicious and unhistorical conception which regards that great conflict as representing either mere ecclesiastical aggression or mere secular tyranny.

It seems to us quite clear that until the beginning of the great conflict the principles represented in the literature of the ninth century continued to be accepted, and that in theory at

least it would have been recognised that the election of the clergy and people, the consent of the comprovincial bishops and the metropolitan, and the approval of the prince, were all normally elements in the legitimate appointment of a bishop. We must examine the evidence in some little detail.

In a treatise of Atto, who became Bishop of Vercelli in the year 945 and died in 961, we find the conditions of an episcopal appointment set out with great clearness. The clergy and people, according to the canons, must have the free and unimpeded right of electing the person whom they think best. The person who is thus elected must then be carefully examined by the metropolitan and the other bishops of the province, and if they find him guilty of some grave fault they are to refuse to consecrate. If, however, they find him worthy of the office, then after due notice to the prince of the territory in which the diocese is situated, and with his consent, he is to be consecrated.¹

The same principles are stated in what seems to be a formula for election contained in a work of Odoramus, a monk of St Peter at Sens, which belongs to the first half of the eleventh century. The Church of Sens proclaims the appointment of a bishop, with the consent and will of the King of the Franks, the comprovincial bishops, the great men, the abbots and clergy, and the faithful of both sexes.²

In these passages we have what seems to us to have been the normal judgment of the times upon the proper conditions of the appointment of a bishop. It is true, however, that the discussion of these questions usually arose under the terms of a more or less controversial assertion of the importance of this or that element in the appointment. This has indeed been the source of a certain confusion in the discussion of the subject, for to the unwary or hasty student, such references might often seem to

assert the necessity of one element to the exclusion of others. We must, therefore, approach the consideration of the subject with caution.

In the first place, we may consider some passages which assert the principle of election by the clergy and people as normal or necessary. In a work of Abbo, Abbot of Fleury, in the latter part of the tenth century, to which reference has frequently been made in vol. iii., we have a very comprehensive affirmation of the election principle in Church and State. There are, he says, three “generales” elections known to him : that of the king or emperor, by the agreement of the whole kingdom ; that of the bishop, by the unanimous agreement of the citizens and clergy; and that of the abbot, by the wiser judgment of the monastic congregation.¹

Alongside of this, we may put some more specific references to the question made by Fulbert, who was Bishop of Chartres from 1006 to 1028. In one of his letters he emphatically refused to take part in the consecration of a certain Theodosius as bishop, on the ground that the prince had no right to thrust a person on the diocese in such a way that neither the clergy nor the people nor the other bishops could exercise a free choice.² That Fulbert did not, however, intend to deny that the prince had his proper place in determining the appointment to a bishopric seems evident from another letter. This is addressed to a certain Avisgaudus, who had resigned his bishopric, and after the appointment of his successor wished to return to it. Fulbert points out that he has no right to do this, seeing that his successor had been appointed after the election of the clergy, the vote of the people, the grant of the king, and the approval of the Roman Pontiff, by the metropolitan, the Archbishop of Sens.¹

Later, in the eleventh century, we find the principle of the need of the election by the clergy and people very strongly affirmed and enforced by the reforming school in Church and State. At the Council which was held by Leo IX. at Rheims in 1049, a canon was promulgated, that no one should be advanced to rule in the Church without the election of the clergy and people. At the Council held at Maintz by him in the same year, two claimants appeared for the archbishopric of Besançon, Berthold, who claimed that he had received the investiture from Rudolph, the King of Burgundy, and had been consecrated by the bishops of the province ; and Hugh, who protested that Berthold had not been elected or received by the clergy and people, but had purchased his appointment from the king with money, while he himself had been elected by the clergy and the people. The Council, after considering the canonical rules, decided that Berthold, inasmuch as he had not been elected by the sons of the Church, and had not been received by them as their pastor, but had always been repudiated, neither could nor ought to have been imposed upon an unwilling people; while Hugh, who had been demanded and elected by the clergy and people as their archbishop, and had held the see for so long a time without reproach, should

occupy it in peace, for he was the true shepherd who had entered by the door, and he who came in otherwise was a thief and a robber.¹ It is noticeable that the decree of the Council was not based upon the charge of simony, which Hugh had brought against Berthold, which may not have been substantiated, but on the ground that the rights of the clergy and people in election had been overridden. And it is further noteworthy that, as we have mentioned in a previous chapter, the Emperor Henry III. was present at the Council, and that it is specially mentioned that he gave his approval to the decision.²

If in these passages we find the clear assertion of the principle that the bishop must be elected by the clergy and people of the diocese, we can also find in the literature of the tenth and eleventh centuries many passages which might be interpreted as implying that the secular ruler, whether king or emperor, really possessed an unlimited power in making ecclesiastical appointments. In the life of St Udalric, which was probably written in the last years of the tenth century, it is in one place said that he asked the emperor that, after his own death, he should confer the bishopric which he occupied upon Adalbero his nephew, and that the emperor promised that he would do this.³ We shall presently have to

consider the passage in which the author of the life describes some of the actual circumstances of the appointment of St Udalric's successor ; in the meanwhile it is important to observe the somewhat arbitrary manner in which the emperor is represented as acceding to this very irregular request.

Again, it is noticeable that Ratherius of Verona, while he vigorously maintains the greater dignity of the bishop as compared with that of the king, and urges that while kings are "instituted" by the bishops, they cannot ordain bishops, yet speaks of kings as having power to elect or designate the bishop.¹

Again, Rodolfus Glaber, while denouncing simony with great vigour, both in his own person and in an address which he represents Henry III. as making to the bishops of Gaul and Germany, seems to assume that kings have the right of appointing to sacred offices.²

It would be quite natural if the hasty student were to judge from such passages as these that at this time episcopal appointments were for the most part made by the secular rulers without any reference to the wishes of the clergy and people, or other ecclesiastical authorities. And yet, in truth, no such conclusion should be drawn, and the real nature of the situation is best understood when we observe that it is quite possible to find apparently inconsistent statements with regard to this question in the writings of some of the most eminent Churchmen of these times.

In the correspondence of Gerbert, afterwards Pope Sylvester II., we can find passages which might serve to defend almost any view of the proper method of appointment to Church offices. In what seems to be a draft of a letter to be written in the name of Adalbero, the Archbishop of Rheims, to the Empress Theophano, the widow of Otto II., she is asked, if there should be a vacant bishopric, not to confer it upon any one who is not recommended to her by the archbishop, and in particular to confer one upon Gerbert.¹ In another letter written in the name of the same archbishop, Adalbero appears as having permitted his nephew to accept a bishopric conferred on him by the king.² In another letter again, written probably in the name of the Archbishop of Trier, he denounces the people of Verdun for their unwillingness to accept another Adalbero as their bishop when he had been appointed by the king, with the consent and approval of the bishops of the province.³ Again, in a letter written in the name of Otto III., Otto is represented as saying that he had bestowed the Abbey of St Vincent, at Capua, upon a certain monk.⁴

If we were to judge from these passages alone, we should naturally come to the conclusion that Gerbert looked upon the appointment to ecclesiastical office as belonging to the secular authorities, with some regard at most to the rights of the comprovincial bishops. When, however, we examine his

letters more completely, we find that at other times they represent quite a different attitude. In a letter written in the name of the abbots of the monasteries of Rheims to the monks of Fleury, he speaks with indignation and contempt of some one who claimed an abbey apparently in virtue simply of a royal appointment.¹ Again, in the document announcing the election of Arnulf to the archbishopric of Rheims in 989, the bishops of the province are represented as saying that they, with all the clergy, with the acclamation of the people, and with the consent of the kings, elect him as their head.² In the letter of the same bishops announcing the election of Gerbert himself as Archbishop of Rheims, after Arnulf had been deposed by the Council of Verzy in 991, there is a very interesting discussion of the true meaning of the requirement of election by the people. They say that they had elected Arnulf under the influence of the popular clamour, inasmuch as the Scripture said, "The voice of the people is the voice of God," and the canons required the desire and wishes of the clergy and people in the election of a bishop. They had not, they say, understood that it is not always true that the voice of the people is the voice of God, and that therefore it is not the wishes of all the clergy and people which are to be considered in the election of a bishop, but only those of the simple and uncorrupted. They quote the Fathers as saying that the election of a bishop must not be made by a mob, but that it should be in the hands of the bishops, that they might prove him who was to be consecrated. They, therefore, the bishops of the province of Rheims, with the favour and approval of the kings, Hugh and Robert, and the assent of those of the clergy and people, who are God's, declare that they have elected the Abbot Gerbert as their archbishop.¹

When we take account of all these passages, it is plain that Gerbert was well aware that the appointment of bishops and abbots was not a matter for the arbitrary decision of the secular power, but that the community of the diocese, whether clerical or lay, and the bishops of the province, in the one case, and the community of the abbey in the other, had their just and legal rights.

The correspondence of Gerbert may serve to illustrate the great need of caution in the interpretation of the occasional phrases of writers of the tenth and eleventh centuries, and the works of Peter Damian make it very clear that even in the third quarter of the eleventh century the most distinguished representative of the reforming party still recognised the complexity of the elements which constituted a legitimate and well-ordered ecclesiastical appointment. By this time the Church was alive to the need of dealing rigorously with simony—we shall discuss this question in detail a little later—and, reforming Churchmen, like Peter Damian, were continually denouncing this vice, and advocating the most stringent measures for its suppression ; but this does not mean that they doubted or denied the propriety of the secular authorities taking their part in ecclesiastical appointments.

In one of Peter Damian's smaller treatises, for instance, he attacks with great vigour the custom of appointing men to bishoprics because of the services which they had rendered in the administration of secular offices, as clerics of the royal or imperial chapels; and he urges upon princes and all others who had the right of appointing to ecclesiastical offices the duty of remembering that they must not use their authority in an arbitrary or capricious fashion.¹ He warns them, that is, against the abuse of their authority ; he does not suggest that the authority itself is illegitimate. In another place, in a letter to the clergy and people of Faenza, he recognises indeed very explicitly their

right to elect their bishop, and the place of the Pope in his appointment; but he praises them that they had determined not to proceed to an election until the arrival of the King.³ In a letter to Cadalous of Parma, who had been elected to the Papacy as Honorius II., in 1061, by a synod of German and Lombard bishops, in opposition to Alexander II., Peter inveighs in somewhat unmeasured terms against his presumption in venturing to claim the Roman See without the will

of the Roman Church; not to speak of the Senate, the inferior clergy, and the people, he ought to have recognised the place of the Cardinal Bishops, who played the principal part in the election of the Roman Pontiff. The canonical authority decreed that even in the humblest church the clergy should have a free judgment about him who was to be set over them. Further on he sums up the principal elements in a just election to the See of Rome. The Cardinal Bishops, he says, play the first part; then comes the assent of clergy in general, and thirdly the approval of the people. Finally, the matter is to wait until the royal authority has been consulted, unless, as had been the case in the election of Alexander II., the circumstances were of such a kind that it was dangerous to wait.¹ The phrases of this letter seem clearly to refer to the new regulation of Pope Nicholas II. for papal elections, and we cite it here as illustrating the fact that Peter Damian recognised both the rights of the clergy and people in election to bishoprics, and also the right of the king or emperor to be consulted.

Perhaps the best illustration of the principles of ecclesiastical appointments during this period is to be found in the accounts of some elections which have been preserved. The first we shall notice is contained in that life of St Udalric, to which we have already referred. It tells us that after his death the envoys of the diocese were sent to the Emperor, carrying with them his pastoral staff. A certain Count Burchardt succeeded in intercepting them, and persuaded them that the Emperor had determined that his son should be the bishop. The envoys are said to have known that it was in their power either to elect him or not; finally they did this, and then proceeded on their way to the Court to obtain the Emperor's confirmation for their election.¹

With this may be compared the account given by Fulbort of Chartres of the circumstances attending the succession to the Abbey of St Peter. When the abbot was dying a certain Megenard went to Theobald, the Count (of Chartres), to ask for the abbacy. The Count sent him back to the monks, desiring them to receive him as their abbot; but they replied that no one could become abbot while the previous one was still alive, or except by the election of the brethren. When shortly afterwards the abbot died, the monks decided that they did not want Megenard as abbot, and determined to send representatives to the Count announcing his death, and asking for his permission to proceed to an election. Two of the monks, however, went off privately to the Count, and represented to him that the brethren had elected Megenard; and the Count, gratified with their compliance, immediately handed over the pastoral staff. The other monks were extremely indignant, and wrote to the Count denying that they had elected him, but he compelled them to receive him.²

We have another interesting and detailed account of an election in the life of St Lietbert, Bishop of Cambrai. On the vacancy of the see he was elected to the bishopric by the clergy and people, and he and the representatives of the Church of Cambrai were then sent to the court of Henry III. to report to him the death of the last bishop and the

election of Lietbert. Henry announced that he would with them elect Lietbert Bishop of Cambrai. The matter was then reported, with the assent of the bishops of the province, to the Archbishop of Rheims, as metropolitan, in accordance with his legal rights, and he gave his approval.¹

More important, however, than these narratives is the very detailed account of the circumstances attending the appointment of Wazo as Bishop of Liège. On the death of Bishop Nithard in 1041 he was, in spite of his reluctance, elected unanimously. He protested that his election would be displeasing to the King, and urged that they should wait to know his will; but his objection was overruled, and he was elected and sent to Ratisbon, where Henry III. then was. On Wazo's arrival there the episcopal staff was handed over to the King with the letter of the Church of Lidge. On the following day the King considered the matter with the bishops and the princes of the palace. A number of them maintained that the election, having been held without the approval of the King, should be set aside, and urged that a bishop should be chosen from the clergy of the royal chapel, among whom Wazo had never served. The opinion of these persons might have prevailed if it had not been for the intervention of Hermann, Archbishop of Cologne, and of Bruno, Bishop of Wurzburg, who finally persuaded Henry to accept the election of Wazo.²

In these narratives we can probably recognise the normal conception and method of appointment during this period. The clergy and people of the diocese or abbey claimed the right of election, but the prince had to give his sanction. We should gather that the person whom the diocese had chosen was sent with the pastoral staff of the bishop to the king, and, if he approved the choice, he would invest him with this. If, however, the king was not satisfied with their election, he might not only refuse his consent, but might proceed to another appointment himself. The person thus appointed would then be sent to the metropolitan, for he and the bishops of the province had the right to be consulted before his consecration.

It is well finally to notice that we can also see that in a number of cases in the tenth and eleventh centuries the Pope took an important part in the appointment of bishops. Pope John XIII. is spoken of as appointing an Archbishop of Salzburg on the election of the Bavarians, lay and clerical.¹ Pope Gregory V. is represented as confirming and corroborating the command of the Emperor, the judgment of the bishops, and the consent and acclamation of the clergy and notables of the diocese, and appointing a certain Arnulf to the bishopric of Auxonne.² Clement II. confirms the election of an Archbishop of Salerno by the clergy, the people, and the prince.¹ Alexander II. gives his formal assent to the appointment of an Archbishop of Rouen by William the Conqueror;² and, as we shall have occasion to consider later, the Papacy is said to have claimed, under the advice of Hildebrand, that no election to the archbishopric of Milan was valid without the papal consent.³ What exactly was the rationale of the papal position in ecclesiastical elections we cannot here discuss, but it is important to observe these illustrations of it.

CHAPTER IV.

THE RELATIVE DIGNITY OF THE TEMPORAL AND SPIRITUAL POWERS.

ENOUGH has been said to make it clear that, while probably every one in the tenth and eleventh centuries would have recognised certain general principles as determining the relative position of the two great authorities, the actual demarcation of the exact sphere

of each authority was somewhat uncertain and fluctuating. The secular authority had its ecclesiastical responsibilities, and the ecclesiastical its political, while in the direction and control of many ecclesiastical matters the Christian people, the laity, had an undetermined but real place. It will be useful to notice a little further some of the conceptions of the time, which illustrate in an undeveloped form the questions round which the later conflicts turned, and the judgment of some great Churchmen on them.

We can find phrases which assert very emphatically the superior dignity of the Spiritual as compared with the Temporal power. We have referred in the last volume frequently to that interesting but somewhat strange prelate of the tenth century, Eatherius of Verona. In his writings we find the confident expression of his conviction of the superiority of his office and position to that of the king. He had become Bishop of Verona through the influence of Hugh, the King of Italy, but quarrelling with him, was imprisoned for a time in Pavia. In his treatise entitled 'Prae- quorum,' he deals very frankly with the king, and admonishes

him to venerate the bishops, and to remember that they have been set over him, and not he over them, and he cites the story of Rufinus about Constantine, and his humility in presence of the bishops at the Council of Nice.¹ He claims that bishops could not be judged except by God Himself,² and that bishops were on a higher level than kings, for kings were created (instituti) by bishops, but bishops could not be ordained by kings.³

Again, in a treatise ascribed to Pope Silvester H. (Gerbert), he urges bishops to remember that no dignity can be compared with theirs, that the crowns of kings are in comparison with the mitres of bishops as lead compared to gold, and that kings and princes bow their necks to the priest and reverence his decrees.⁴

We shall perhaps find the most significant and weighty assertion of this principle in some words attributed to that Wazo, Bishop of Lidge, to whom we have already referred several times. His biographer relates how on one occasion, when attending the court of the Emperor Henry III., he asked that he should be provided with a seat, for it was not seemly that one who had been anointed with the holy chrism should not receive due respect. The Emperor said that he also had received his authority with the anointing of the holy oil, but Wazo replied that this unction which he had received was very different from that of the priest, and greatly inferior, for it was the sign of the power of death, while that of the priest was the sign of the power of life.¹

When, however, we have recognised how emphatic, even in those times, was the claim that the Spiritual power was superior in dignity to the Temporal, we must be careful to observe that this did not at all mean that the ecclesiastical person was not subject to the secular in secular matters. The greater clergy, that is the bishops and abbots of the greater monasteries, were by the end of the tenth century, in almost all cases, the vassals of the emperor or king, or of some great lord, and as such they owed them loyalty and were subject, with respect to their feudal tenure, to the jurisdiction of the feudal courts.

We have cited above the words in which Gerbert, as Pope Silvester H., speaks of the dignity of the bishop as greater than that of the king ; but it is important to observe that the same Gerbert, when he was Abbot of Bobbio, speaks of himself as having once indeed been free, but now as the servant of the Emperor.² Again, Wippo, in his life of the Emperor Conrad I., in relating the rising of the "Valvassores" in Lombardy

against the greater feudal lords, mentions that he seized three of the Lombard bishops and sent them into exile. It gave, he says, great offence to many that the priests

of Christ should be condemned without a trial, and he specially mentions that Henry, the son of Conrad (afterwards Henry III.), was much displeased with his father's action. The bishops indeed would have had no claim to honour had they been deposed by a judicial sentence, but before such a judgment they were entitled to the reverence which is due to the priest.¹ The general disapproval of Conrad's action against the bishops without regard to the proper judicial forms, only brings out more clearly the fact that it was recognised that the bishops were liable to the judgment of the proper courts for offences against the Emperor.

This is brought out even more emphatically in the same life of Wazo of Liège which we have just cited. Wiger, the Archbishop of Ravenna, was accused of various ecclesiastical irregularities, and summoned to the court of the Emperor, and the matter was referred to the bishops. There was much hesitation among them, but Wazo declared that an Italian bishop could not be judged by a northern one. At last, when called upon by the Emperor in the name of his obedience to give his opinion on the whole matter, he replied that they, the bishops, owed obedience to the Pope and fidelity to the Emperor ; that they had to render account to the latter with regard to secular matters, but to the former with respect to spiritual; if, therefore, the Archbishop of Ravenna had committed an offence against the ecclesiastical order, the judgment on this belonged only to the Pope, but if he had acted negligently or unfaithfully in those secular matters which had been entrusted to him by the Emperor, this without doubt should be dealt with by him.¹

Wazo's determination to maintain the autonomy of the spiritual authority within its own sphere is evident, but equally evident is his judgment that with regard to secular matters the bishops were subject to the judgment of the secular authority.

It may perhaps serve to bring out most clearly the complexity of men's conception of the character and relations of the Temporal and Spiritual powers if we again consider briefly the position of Peter Damian, to whom we have already referred several times. He was, as we have said, one of the most convinced and energetic promoters of the reform of Church order and discipline in the third quarter of the eleventh century, but died just before the great conflict between the Empire and the Papacy broke into open flame.

It would be quite easy to bring forward passages from his writings which might, if taken alone, seem to show that his position was that of either the one or the other of the two great parties into which Europe was presently to be divided. As we have already seen, he recognised very clearly, in spite of his zeal for the reform of the methods of ecclesiastical appointments, the legitimate place of the secular authority in regard to them. In his letter to the people of Faenza he commends their determination not to proceed to the election of their bishop till the King (Henry III.) should arrive.¹ While warning the secular princes against the error of thinking that they have arbitrary rights of appointment, he seems clearly to recognise their rights.² Even with respect to appointments to the Papal See, he seems clearly to interpret the decree of Pope Nicholas II. as implying that the election was not to be reckoned as complete until it had been submitted to the royal authority.³ And in his references to Henry III. he recognises, as we have seen, in the most unqualified terms the service which he had rendered to the Church in purging it from simony, and compares him to King Josiah, who, when he had found the Book of the Law, overthrew the altars and the abominable idols and superstitions of former kings, and says that it was because

he refused to follow the corrupt example of his predecessors that, by the divine dispensation, it had come about that the Roman Church was now ordered according to his will, and that no one should be elected to the Roman See without his authority.⁴

If, however, from such passages as these we may justly infer that Peter Damian admitted the propriety of the intervention of the Temporal power in ecclesiastical affairs, we can also find in his writings phrases which express a very high sense of the superiority of the Spiritual power over the Temporal. In one place he describes the Pope as the King of Kings and Prince of Emperors, who excels all men in honour and dignity.⁵ It is Peter Damian who apparently first used some words which were frequently cited in the later controversies. He speaks of Christ as having committed to St Peter “*beato vitae aeternae clavifero, terreni simul et celestis imperii iura*” ; and, in another place, as having committed to St Peter the laws of heaven and earth.¹

These phrases have an important history, and were often interpreted as implying that the successor of St Peter had in some sense authority in temporal as well as spiritual matters and organisations.² What exactly Peter Damian may have himself meant by these words is exceedingly difficult to say : the contexts in which they occur do not throw any light upon the interpretation. It seems to us, from an examination of his whole works, extremely improbable that he meant to assert the supremacy of the Spiritual power over the Temporal in temporal matters, but certainly he did mean to assert the great superiority in dignity of the Spiritual power, and the principle that even the greatest men, kings and emperors, were subject to the spiritual authority of the Pope.

Once at least his language suggests an ominous anticipation of the great conflicts which were soon to break out. In a letter addressed to Henry IV. he exhorts him to support the Church and the true Pope, Alexander II., against Cadalous of Parma, the anti-pope, who had been elected by a council of Lombard and German bishops in 1061; and he urges that Henry will be worthy of blame if he does not do this, and that the king only deserves obedience when he obeys his Creator—if he disobeys the divine commands he may rightfully (lawfully) be deposed by his subjects.³

When, however, we have taken account of the various aspects of the conceptions of Peter Damian, it remains quite clear that his normal judgment on the relation of the Temporal and Spiritual powers is practically based upon what we have called the Gelasian tradition—that is, the conception set out in the fifth century by Pope Gelasius I., of the autonomy of each of the great powers within its own sphere.¹ We think that this is implied in a number of passages in his writings, and under terms which are interesting and important.

In that same letter to Henry IV., from which we have just quoted, Peter Damian speaks of the close union which ought to exist between the royal and the priestly power, for each has need of the other. The priesthood is protected by the kingdom, and the kingdom by the sanctity of the priestly office. The king is girded with the sword to resist the enemies of the Church, while the priest gives himself to prayer that he may propitiate God to the king and people.’ In another place he very carefully distinguishes the functions of the two powers : the function of the priest is to abound in compassion, and to cherish the children with motherly love ; the function of the judge is to punish the wicked, to deliver the innocent from their hands ; he must always remember the words of the apostle : “*Wouldest thou have no fear of the power ? Do that which is good, and thou*

shalt have praise of the same: for he is the minister of God to thee for good. But if thou doest that which is evil, be afraid ; for he bareth not the sword in vain.” There is a great difference between the sword of the prince and the infula, of the priest.³

In another place he expresses the same judgment in slightly different phrases. The tribunal of the judge is clearly different from the seat of the priest. The judge bears the sword that he may punish those who live unrighteously ; the priest is content with the staff of innocence that he may maintain a quiet and peaceable discipline.¹ And, in yet another place, he sets out the same principle under the terms of the two swords, and he describes the felicity of that condition of things when the sword of the kingdom is joined to the sword of the priest, when the sword of the priest tempers that of the king, and the sword of the king sharpens that of the priest; for these are the two swords spoken of at the time of the Lord’s Passion. Then, indeed, will the Kingdom and the priesthood be set forward and honoured, when they are joined in this happy union.²

The two swords are both from God : both represent the divine authority, and they ought to be in the closest alliance with each other ; but it is very noteworthy that Peter Damian talks of them as quite distinct and independent, and that he in no way suggests that conception, which appeared later, that both swords belonged to the Spiritual power.³

PART II

THE INVESTITURE CONTROVERSY.

CHAPTER I.

SIMONY.

WE have endeavoured to consider the relations of the temporal and spiritual authorities during the tenth century and the first seventy years of the eleventh, and we think that it will be evident to any one who examines the history of the subject dispassionately that, while there was much in these relations difficult and in various ways unsatisfactory, yet that it is on the whole true to say that the relations were friendly and sympathetic. There is no evidence that there was any settled desire upon the part of the emperors or kings to invade the liberties of the Church, or on the part of the Popes or bishops to claim any political authority beyond that which had been recognised in the tradition of the ninth and tenth centuries. We may very well say that so far the two authorities were working together for the progress of European civilisation, not without occasional friction, but on the whole in harmony, and, as far as the best representatives of each were concerned, with a large measure of mutual understanding.

We have to consider the history of a time during which all this was changed, and the peace and co-operation of the earlier time were exchanged for violent conflict and mutual animosity. We must, indeed, guard against a mistake into which the unwary may fall. The conflicts of the two powers were not continual from Hildebrand to Innocent III. : during many years in that period the relations of Emperor and Pope were friendly. It may, indeed, be urged that this was abnormal, and that normally during this time their relations were hostile, that no solution of the conflicting claims had been reached, and that these intervals of tranquillity were only like the periods of an armed truce in a great campaign. It would be premature to pronounce a definite judgment upon this view till we have examined our materials in detail: we must bear in mind that it is just this subject which we have to examine, and we must lay aside our preconceptions if we are to hope to do this with any success.

The first aspect under which we must consider the great conflict is that which is generally known as the “ Investiture ” controversy, or to put it in broader and more correct terms, the question of the place of the secular authority in the appointment to ecclesiastical offices. It is still difficult to be quite certain about all the circumstances which, in the third quarter of the eleventh century, caused this question, with apparent suddenness, to become so important; but it is possible now, at least, to trace and to recognise some of the facts, and some of the movements of feeling and opinion which lay behind this.

It seems to us to be clear that this conflict, like other movements in the Church, arose out of a great spiritual revival. Behind the noise of ecclesiastical strife there lay the profound and far-reaching influence of the religious revival which had found its centre in the latter part of the tenth century in the Abbey of Cluny. It was not, indeed, that the secular authorities were in any way hostile to this reformation ; on the contrary, it is clear that some of the emperors, both of the Saxon and Franconian houses, were among its most energetic supporters ; and yet it is also true that the movement did ultimately raise questions which proved to be subversive and hard of solution.

The two questions on which in the end the Cluniac reformation brought the Spiritual and Temporal powers into collision with each other were, first, the question of simony, and second, the question of the place of the greater clergy in the administration of political affairs. It is, indeed, true that some of the greatest emperors, like Henry III., did a great deal to assist the reforming Popes and bishops to suppress the venality of ecclesiastical appointments, but it was only some whose convictions were sufficiently strong to enable them to resist the financial temptation. The question of the place of the greater clergy in the political structure of the Empire and of other countries was probably even more difficult. The bishops and abbots were the mainstay of the national and general as distinguished from the local and particular interests. The development of the hereditary principle in feudalism had in great measure broken up the administrative system of political society ; it was only in the twelfth and thirteenth centuries that in England and France the national monarchy slowly built up a new administrative system powerful enough to counteract the disintegrating forces of feudalism. In the tenth and eleventh centuries the bishops and abbots, and the clergy of the royal and imperial chapels, represented the main elements on which the kings and emperors could construct a system of government, and it was a matter of imperative necessity that they should be men of administrative training upon whose personal loyalty they could depend. It was, therefore, of the greatest importance that the secular authorities should possess a predominant influence in the selection of men for ecclesiastical office, and it was natural that they should generally find the men best suited for this among those who had served their apprenticeship in the royal chapel. It was almost inevitable that in the long run the reforming party should come into conflict with the political authorities over this very point, for to the religious reformer it was above all things essential that the bishops and abbots should be men controlled by religious principles and devoted to the interests of the Church. The wiser and more religious-minded rulers, like Henry III. or William the Conqueror, would indeed recognise this, but the lesser men, the more unscrupulous and short-sighted, would not do so.

We cannot here discuss the whole history of the growth of simoniacal practices in the mediaeval Church ; we must content ourselves with a brief account of the conditions as they appear in the literature of the eleventh century. Rodolfus Glaber gives in general terms a very gloomy account of the conditions as they had existed for some time. Even the kings, he says, who ought to have been careful to see that fit men were appointed to the government of the Church, rather deemed those to be the most suitable from whom they received the largest gifts.¹ In another place, he reports a speech addressed by the Emperor Henry III. to the bishops of Germany and “ Gaul ” on the same matter, and represents him as saying that he was well aware of the extent of the simoniacal practices, and that he acknowledged that his father (the Emperor Conrad the Salic) had been greatly guilty in the matter. He reports also that Henry proposed that it should be decreed for the whole Empire that no clerical rank or ecclesiastical office should be obtained for a price ; and that if any one dared either to give or to receive this he should be deprived of his office and anathematised ; and that for his part he promised that, as God had freely given him the imperial crown, he would freely give whatever pertained to religion.²

Humbert, Cardinal of Silva Candida, was one of those northern ecclesiastics of the reforming school whom Bruno

of Toul brought with him to Italy when he became Pope as Leo IX., in 1048. In one place he says that, from the time of the Othos to that of Henry III., the vice of simony had prevailed in Germany, the “ Gauls,” and Italy. Henry III. had indeed done something to remove it, and had desired to destroy it wholly, but had been cut off by a premature death. Humbert denounces with special vehemence the contemporary King Henry I. of France, who had so far persisted in this vice.¹ In another place he says that every one, from the highest to the lowest, was engaged in the traffic in ecclesiastical things ; that emperors, kings, princes, and all other secular authorities, who ought to defend the Church, forsook their own proper work that they might possess themselves of the property of the Church.² Simony had indeed begun even in apostolic times, but had disappeared in the time of persecution ; it was with the restoration of peace to the Church, and the submission of the emperor to the authority of the priest, that it had revived, for the prosperity of the Church stimulated men’s cupidity.³ He represents the matter as having gone

so far, and. become so open and shameless, that any one who desired a place of authority in Church or State had to pledge himself by oath to maintain the simoniacal persons in their pretended rights. The emperor himself had to swear that, so far from maintaining the laws of his pious predecessors against simony, he would render them null and void.¹ He says that he had known it to happen that, in order to pay the price which he had promised, the wretched simoniacal purchaser was actually compelled to strip off the precious marbles of the churches, and even the very tiles from their roofs ; ² and in another place he describes in lamentable terms the ruin and desolation of the churches and monasteries, especially in Italy, which had been brought about by this vice.¹

Lambert of Uersfeld represents the Archbishop of Bremen and Count Werner, while they controlled the government during the minority of Henry IV., as selling all offices, whether ecclesiastical or secular, and especially the abbacies.²

We must not indeed take such statements as these too literally, we must be prepared to allow for something at least of exaggeration in the picture which they present of the condition of the Church ; but there is no reason to doubt that it was substantially true, and there was no question of Church order to which the reformers felt it more necessary to turn their attention. We have already dealt with the history of the deposition of the Pope at Sutri, and have noted

the gratitude which Yaany of the most eminent reformers express to Henry III. for his work both in this matter, and in regard to the whole matter of simony.¹

We have a detailed account of the proceedings which Pope Leo IX. took for the suppression of simony in France. He summoned a Council of the bishops and abbots at Rheims in 1049, and invited the attendance of the King of the French. His courtiers urged upon him that it would be in the highest degree dangerous to the honour of his kingdom if he were to support the Pope in holding a Council in France, and that this had not been permitted by his predecessors, and they urged him to summon the bishops and abbots to attend him on an expedition against the disturbed parts of the kingdom, so that they might not be able to attend the Council.² The King accordingly replied to the Pope that he and his bishops would not be able to attend the Council, and urged him to postpone his visit to France. Leo IX. replied that he could not do this, and must hold the Council with those who could be present. When the Council met, several bishops and abbots were deposed for various offences, especially for simony, and the Archbishop of Rheims was ordered to present himself at a Council to be held later in Rome, and there to purge himself of the charge of simony which had been brought against him.³ The Council issued a canon, laying down the principle that no one should be promoted to a bishopric without the election of the clergy and people, that no one should buy or sell Holy Orders or ecclesiastical office, and that if any one did obtain them by purchase they should surrender them to the bishop. The canon also provided that no layman should hold a benefice, and that the clergy should not bear arms, or hold secular office.¹ The life of Pope Leo IX. by Wibert, the Archdeacon of Toul, gives us a further account of the strong measures which the Pope took, both in Italy and elsewhere, for the suppression of simony, and relates how he deposed both archbishops and bishops who had been guilty of it.²

These severe measures of Pope Leo IX. were only the first steps in a determined effort of the reforming party in the Church, now led by the reformed Papacy, to suppress the buying and selling of spiritual offices. Indeed so severe was the attitude of some of the reformers that it finally produced a violent controversy among themselves. Some, like Cardinal Humbert, maintained that ordination or consecration obtained by simony was null and void,³ while others, like Peter Damian, maintained that they were valid,⁴ and that while those who were guilty should be deposed, those who had innocently obtained Holy Orders from such persons should be allowed to retain their position.¹ It is not our part here to discuss the significance of the question raised in this controversy, we are here only concerned to observe how great was the evil, and the determination with which the reformers of the eleventh century set themselves to root it out.

For our purposes this question of simony is important chiefly in its relation to the circumstances which brought about the great conflict between the spiritual and temporal authorities. As we have seen, until the death of Henry III. in 1056, the reforming party in the Church had been supported with an evidently sincere zeal by the secular power in its

effort to suppress simony. Behind this problem, however, there lay others which, as we have already pointed out, were even more difficult to deal with. It is very noteworthy that Peter Damian is very clear that the Church suffered as much from the promotion of men to bishoprics and abbeys on account of services which they had rendered in the administrative offices of the State as from actual simony. In a letter addressed to Pope Alexander II. he urges upon him that no one should be permitted to be made a bishop or to remain in his office who had obtained this *per procum*, or, what is even more worthy of condemnation, by service at court.² In a treatise, which is really directed against the clergy of the court, he says that nothing seemed to him so intolerable as that some men, in their greedy desire for ecclesiastical office, behaved almost as though they were the serfs of men in great position ; and urges that it is just as much an act of simony to obtain a bishopric by service to the king in his court as to purchase it with money ; and he warns princes and others who have the power of appointing to offices in the Church that they must not bestow them according to their mere will and pleasure.¹

Cardinal Humbert deals with the same subject in fiery and passionate phrases. He evidently does not wish to condemn the administrative work of the clergy altogether, indeed he seems to be conscious that there were occasions when such work was of great service, not only to the State but to the Church, but he denounces in emphatic terms the crowds of greedy clerks who thronged the courts of princes and undertook long and laborious service that they might at length obtain some ecclesiastical office. He would indeed term such men simoniacal above all measure who gave not only money but themselves, and complains that Italy especially was full of men who had received Church offices not for their ecclesiastical work, but as a recompense for secular services, sometimes even of a scandalous and disgraceful nature.²

These complaints and contentions were no doubt in a great measure well founded and legitimate, and yet it is also clear that the question raised was one of great difficulty. The State had urgent need of the services of men trained in administrative work, and of men upon whose personal loyalty the kings or emperors could depend, and it is difficult to see where they could at that time be found outside of the ecclesiastical profession.

CHAPTER II.

THE PROHIBITION OF LAY "INVESTITURE."

WE have thus endeavoured to consider some of the conditions or circumstances out of which the conflict between the Empire and the Church arose. It is clear that there was a great evil in the Church, that the buying and selling of Church offices had grown to a point at which the strongest measures of reform were not only justified, but were imperatively required. It is, however, clear also that during the reign of Henry III. the imperial authority had been on the side of reform, and that, while there may have been question as to the propriety of some of the actions which had been taken in promoting reform, on the whole the reforming party recognised his sincerity, and was grateful for his energy. We have now to consider the rapid change in the relations of the spiritual and temporal authorities, which in the course of some twenty years (from 1056 to 1076) passed from those of friendly affiance and co-operation to those of a violent hostility.

The Popes, after Sutri, had set their hands to the work of reform, and in their efforts they had received the support of Henry III. Unhappily, he died before the work had been accomplished, and with his death the ecclesiastical conditions of Europe relapsed into confusion. We have already cited the melancholy account of the ecclesiastical condition of

Germany during the minority of Henry IV., under the administration of the Archbishop of Bremen and Count Werner ; how they treated all offices, ecclesiastical and secular, as matters of

buying and selling to such a degree that no man could hope for promotion in Church or State unless he was prepared to purchase it from them.¹ When Henry IV. took over the government himself, it would seem that there was little improvement. The Bishop of Bamberg was summoned to Rome in 1070, and was charged with having obtained his bishopric by simony. Lambert of Hersfeld indeed accuses the Pope, Alexander II., of accepting large presents from him, and consequently acquitting him of the charge ; but he also relates that he and the Archbishops of Maintz and Cologne were severely reproved by the Pope for having sold Holy Orders, and for having communicated with simoniacal persons, and were required to take a solemn oath that they would not do this again.²

Under the following year Lambert relates that Henry IV. simoniacally appointed an Abbot of Reichenau, and endeavoured to force upon the Chapter of Constance as bishop a man who was by them accused of simony and theft.³ The Pope referred the question to the Archbishop of Maintz, and we have the letter in which he represents the great difficulties in which he was involved on account of his obedience to the Pope—the king had evidently threatened him violently if he should refuse to consecrate the Bishop-designate of Constance.⁴

In a letter of Henry IV. to Gregory VII., of the year 1073, he acknowledged his faults, and among others, that he had been guilty of simony, and asked the help of his advice and authority in setting these matters right. He also speaks of having been guilty of serious faults with regard to the Church of Milan.¹

Again, under the year 1074, Lambert relates that the legates of the Apostolic See in Germany were careful not to associate with Henry IV., as he had been accused of simoniacal practices. Gregory VII. had sent these legates to Germany to deal with persons accused of simony, and they desired to hold a synod. The bishops stoutly resisted this, maintaining that they could not suffer this to be done except by the Pope himself. The Pope had already suspended the Bishop of Bamberg and certain others from the discharge of their sacred functions, until they should purge themselves in his presence. Henry IV., indeed, according to Lambert, was anxious to support the legates, in the expectation that this would result in the deposition of the Bishop of Worms and others who had opposed him in the Saxon war ; it was, however, finally found that the matter was too difficult for the legates to deal with, and it was referred to the hearing of the Pope himself.²

It was not only in Germany that the question of simony was urgent. We have already considered the severe measures which Leo IX. had taken at the Council of Rheims in 1049 to deal with the matter in France, but it is evident that in spite of his efforts the evil had not been removed. It was indeed in Gregory VII.'s correspondence with the French bishops that he first began to threaten vigorous measures against the secular authorities. In a letter of the year 1073 to the Bishop of Chalons he describes Philip, the King of France, as having gone further in the oppression of the Church than any other prince of this time, and he threatens that if Philip would not abandon the heresy of simony, he would issue such a general excommunication that the French people would refuse any longer to obey him.¹ In the same year he instructs the Archbishop of Lyons to consecrate the Bishop-elect of Autun without waiting further for the consent

of the King of France.¹ In the following year Gregory wrote to the archbishops and bishops of France, and denounced Philip as one who could not be called a king, but only a tyrant. He blamed them severely that they had not used their priestly authority to restrain him from his crimes, and commanded them to meet and jointly to address him and denounce his crimes to his face. If the king should refuse to hearken to them, he bade them withdraw themselves from his communion and obedience, and prohibit the public celebration of all divine service throughout France. If Philip would not even then submit, he gave them to know that he would do all in his power to take the French kingdom from him.⁸

Gregory's letters indicate that the crimes with which he charged Philip were not only against the general wellbeing of the Church—in other letters he refers specially to his plundering of Italian merchants in France¹—but that the degradation and disorder of the Church in France were caused especially by the prevalence of simony, and demanded the most stringent reform; and it is also clear that it threatened to produce the same collision between the temporal and spiritual authorities as in the Empire after the death of Henry III.

It is thus clear that the relations between the temporal and spiritual authorities were becoming difficult, and we think that it is reasonable to say that behind any particular occasions of difference there lay a more general cause, and this was the fact that after the death of Henry III. the temporal authority was no longer co-operating with the spiritual in the attempt at reform, but seemed rather to be responsible for the continuance of grave evils, such as simony and the secularisation of the clergy. It was under these circumstances that the Papacy began to develop the policy of limiting or prohibiting the intervention of the secular authority in ecclesiastical appointments. This may have been justifiable and even necessary, but it must be admitted that it was a step of an almost revolutionary character.

In the first part of this volume we have seen that it was not generally disputed that the king or emperor had a legitimate place in the appointment of bishops and abbots, while the rights of the clergy and people of the diocese in election, and of the metropolitan and the other bishops of the province in confirmation were also generally recognised. In actual fact no doubt the prince often determined such appointments with little reference to the wishes of the electors, but it would be a great exaggeration to say that any responsible person thought that these were negligible. It is, however, true that it was with regard, to the question of the adjustment of these rights to each other that there first appeared the signs of the future trouble. We have already seen some clear evidence of the growing urgency with which the reforming Churchmen and Church Councils urged the rights of the clergy and the people of a diocese to be consulted in the appointment of a bishop. We have seen how emphatically the Council of Rheims, in 1049, asserted the principle that no one should be appointed to authority in the Church without the election of the clergy and people,¹ and we have seen how the Council of Maintz set aside one of the claimants to the archbishopric of Besançon on the express ground that he had not been chosen by the clergy and people.² Lambert of Hersfeld relates the indignation of the clergy and people of Trier, when on the death of Archbishop Eberhard, in 1066, a certain Cuono was appointed by the intervention of the Archbishop of Cologne without reference to them.³

We have had occasion already to consider some of the principles of the two most important writers of the reforming party—that is, of Cardinal Humbert and Peter Damian—and we must now turn again to their work as illustrating the development of this question, but also as making it clear that at least at the outset, even the most eminent reformers did not intend to deny the temporal authority the right to some place in ecclesiastical appointments. In one place Cardinal Humbert lays down in very emphatic terms the conditions of a legitimate and canonical appointment. The man, he says, who is to be raised to the episcopate must first be elected by the clergy, then asked for by the people, and then only is he to be consecrated by the bishops of the province, with the approval of the metropolitan : he who has been consecrated without regard to any one of these conditions

is to be reckoned a false, not a true bishop.¹ Humbert's words, indeed, raise two other questions, the one concerning the impropriety of the creation of a bishop without a definite diocese, the other about the relation of the authority of the metropolitan to that of the Apostolic See, but we cannot here deal with these.

In another place he denounces the arrogance and avarice of the princes of his time, who had, in defiance of all divine and human laws, drawn into their own hands the whole authority of bestowing ecclesiastical appointments, and contrasts this with the conditions of the “*imperium Transmarinum*” (the Eastern Empire), where the control of such appointments was left to the metropolitans and bishops.²

If we were to isolate these passages we might conclude that Humbert meant to exclude the secular authority from any part in episcopal appointments, but that this is not his intention

is plain when we consider another passage in the same treatise. Here, indeed, he complains bitterly of the subversion of all true order in such appointments : the first had been last, and the last first; the secular power claimed the first place in election, and the people, the clergy, and even the metropolitan had to accept its decision whether they were willing or not. It must, however, be observed that he states the true method of appointment as being that the metropolitan should confirm the election by the clergy, while the prince should confirm the demand of the people ;¹ that is, Humbert very clearly recognises that the prince is to be consulted and his approbation secured.

If we turn to Peter Damian it seems clear from the passages which we have already cited² from his works that his position was the same as that of Humbert. He protests emphatically against the abuse of the power claimed by the secular power, and asserts the rights of the clergy and people in the election of their bishop, but also he very frankly recognises that the secular power had its reasonable and just place in such appointments.

The position of the reformers was, we think, clear : they were determined to vindicate the freedom of ecclesiastical elections, and to reduce the claims of the secular power to what they conceive to be reasonable limits, but they did not propose to repudiate these altogether. We can, however, carry the matter further, for we think that the correspondence of Gregory VII. himself serves to show that at least in the first years of his pontificate he did not refuse to recognise the claims of the secular authority in episcopal appointments.

In a letter of the year 1073 to Humbert, the Archbishop of Lyons, already cited, he instructs him to consecrate a certain Landric, who had been elected by the diocese to the bishopric of Autun, without waiting further for the consent of the King of France.¹

Gregory no doubt sets aside the rights of the King, but he only does it on account of his negligence and delay. In a letter of the same year to Anselm, the Bishop-elect of Lucca, he forbids him to receive the investiture of the bishopric from the king's hand until he had renounced his intercourse with excommunicated persons and made his peace with the Roman See ; ² but it is noticeable that the prohibition is related only to the actual circumstances of the moment. In a letter addressed, in 1074, to the Count of Die and the faithful people of that church, he speaks of the Count as having elected the bishop with the consent of all the others—presumably the clergy and people of the diocese.³ Again, in a letter addressed in the same year to Hubert, the Count, and the people of Fermo, he says that he had entrusted the church to the archdeacon until by his own care and the counsel and permission of the king a suitable person should be found for the bishopric.⁴ In a letter of 1075 to Sancho, the King of Aragon, he discusses the arrangements to be made for a diocese in view of the failing health of the bishop. The King and bishop had proposed to him the names of two clerics of whom the one should be made bishop. Gregory refuses to accept either of them on the ground that they were the sons of concubines, but promises to consider the matter if a man of suitable character were recommended to him by the King and the bishop with the approval of the diocese.¹ In January of 1076, in a letter to Henry IV., while he rebukes him for giving the bishoprics of Fermo and Spoleto to men who were unknown to him, he only expresses a doubt whether a church can be given by any man ; he does not positively say that the King had no rights in the matter.²

Even after Gregory VII. had issued the decree against lay “ investiture,” we still find phrases in his correspondence which seem to recognise some place for the secular authority in the appointment to bishoprics. In a letter of the year 1077 to Hugh, the Bishop of Did, he writes that Philip, the King of France, had asked him to consecrate the Abbot of St Euphemia in Calabria to the bishopric of Chartres, but says that he will not do this until he was sufficiently informed about the wishes of the diocese.³ And again, in a letter of the year 1079 to Rudolph of Suabia, who had been elected as King of Germany by the Diet of Forchheim in 1077, he discusses the election of an Archbishop of Magdeburg as a matter with which Rudolph was concerned, and only suggests that, if they are willing to take his advice, they will elect one of two ecclesiastics whom he recommends, but this must be done with the consent and election of the archbishop and bishops, and of the clergy and laity.¹

It would appear then that it would be a mistake to think that the reforming party in the Church set out to put an end wholly to the traditional place of the secular authorities in the appointment of bishops. It would seem that, while they felt that the actually existing methods and forms through which this authority had been exercised were inadmissible, and while the freedom of ecclesiastical elections needed to be asserted and safeguarded, it was rather the degree and extent of the authority of the secular power, and the forms through which it was exercised, than the authority itself which they attacked.

As we shall see in later chapters, the question of the forms under which investiture was granted came to play a very important part in the controversy, and it is therefore convenient to consider at this point one of the earliest careful and reasoned discussions of the question. The treatise of Cardinal Humbert against simoniacal persons, to which we

have already so often referred, was written in the year 1058-9, and a passage from which we have already cited a few words, deals with the question in detail. Humbert, as we have seen, admits that the consent of the prince must confirm the desire of the people, but he complains that in violation of the canons all proportion and order had been completely destroyed, the secular authority had claimed the first and supreme place in the appointment of bishops, and the consent of the clergy and people and of the metropolitan had to be given whether they were willing or not, and, he contends, appointments made under such conditions were really invalid. It cannot, he maintains, belong to lay persons to bestow the pastoral staff and the ring, for these were the sacramental symbols of spiritual powers and offices, and when they had once been bestowed there remained no freedom of action, either to the people and clergy with regard to election, or to the metropolitan with regard to consecration.¹

Humbert evidently felt that, when the secular authority invested with the pastoral staff and ring, this represented a wholly false conception of its relation to ecclesiastical appointments : these were the symbols of a spiritual office which could not be conferred by lay authority, and once given they superseded and overrode the rights of the electors and of the metropolitan. It would appear, then, that at least as early as 1058-9 the objections to the investiture of a bishop with the ring and staff had taken definite form, and it was especially under these terms that the position of the reforming party, with regard to the claims of the secular power to authority in ecclesiastical appointments, gradually took shape. We must, however, be careful to notice that there runs through the whole literature of the subject a certain ambiguity about the term “ investiture ” : we cannot always be certain whether it is being used in the technical sense of the bestowal of the pastoral staff and ring, or in the more general sense of appointment.

We have then considered the general nature of the circumstances out of which the conflict about investiture between Gregory VII. and Henry IV. arose, but before we deal with this we must take account of one particular dispute which had been going on for some time, and which may have had a considerable importance in producing the final rupture. This was the question of Milan.

We cannot here deal with the grave troubles which had been caused in many places, but especially in Milan, by the determined attempt of the Papacy, especially after Pope Nicholas's decree of 1059, to suppress the marriage of the clergy.¹ In the year 1059 Peter Damian and the Archbishop of Lucca had been sent to Milan to deal with these troubles, and it is plain that there was great contention in Milan about the exact nature of the authority of the Papal See in that city.² We are here concerned with the question which presently arose as to the respective claims of the Pope and the emperor to the power of ratifying or rejecting the election of the Archbishops of Milan. We have a detailed account of the conflict in Arnulf's history of the Archbishops of Milan, and while it is obvious that he writes as a partisan of the Imperialist party, his statements furnish us with an important account of the standpoints of the conflicting parties. He contends that the ancient custom of the Italian kingdom had been that, on the death of a bishop, the king should, at the request of the clergy and people, appoint a successor. The Romans, he says, maintained that this was not canonical, and Hildebrand, when he was Archdeacon of Rome, endeavoured to abolish the old custom and to introduce a new rule that the

consent of the Roman See should be recognised as necessary to an election.³ On the death of Archbishop Wido in

1071 the conflict broke out. Herlembald, who had been one of the principal leaders in the agitation against the married clergy, procured the election of a certain Atto by a part of the clergy and people, and with the permission of Rome. Arnulf maintains that the larger part of the clergy and the wiser people desired to recognise the king's rights and the older custom, and the bishops of the province having received the king's mandate, met at Novara and consecrated a certain Gotofrid as archbishop. Hildebrand, on his accession to the Papacy in 1073, summoned Gotofrid and his consecrators to a synod, and confirmed the election of Atto.¹ For the time being Henry IV. submitted, and in the letter already cited he acknowledged his faults and expressed his willingness to accept the papal decision about Milan.²

It was in 1075 that Gregory VII. issued the decree prohibiting all lay "investiture." Unhappily we have no complete account of its terms : it is not contained in Gregory's Register, and our only precise statement with regard to it is preserved in the work of Arnulf to which we have just made reference. His report is, however, so brief and summary that we cannot be certain that it gives us the exact terms of the decree. He says that Gregory, in a Synod at Rome, forbade the King (Henry IV.) to have any "ius" in granting bishoprics, and that he removed all lay people from the investiture of churches.¹ It is possible that it was not intended to publish the decree at once, and that Gregory was willing to consider the possibility of modifying its terms—this seems to be implied in his letter to Henry IV. of January 1076.² That Arnulf's statement is substantially correct would seem clear, not only from the reference just cited, but from several other distinct references to the subject in his correspondence.

In a letter of March 1077 to the Archbishop of Tours, Gregory says that he understands that the Princes of Brittany were willing for the future to give up the ancient but evil custom of claiming the right to the "investiture" of bishops and of selling their consent.³ In a letter of May 1077 to Hugh the Bishop of Did he deals with the circumstances of the appointment of Gerard to the bishopric of Cambrai. He had been elected by the clergy and people, and had then received the bishopric from Henry IV., and he pleaded that he had not known of Gregory's decree—the decree forbidding this—and that Henry had been excommunicated. Gregory therefore expresses his willingness to accept his election, but on the condition that Gerard should declare this (i.e., his ignorance) before a council of the Archbishop and bishops of the province of Rheims. Gregory also instructs the Bishop of Did at this council to make it known to all those assembled

that no secular authority or person was to interfere with the bestowing of such offices, and that any metropolitan or bishop who should consecrate any one who had received a bishopric from a lay person would be deprived of his dignity and office.¹ In March of the year 1078 Gregory accepted the same excuse, that he had not known of the papal decree, from Huzmann, Bishop of Spire, and in view of this confirmed him in his bishopric.²

It would seem then to be clear that the statement of Arnulf is correct, and that Gregory had in 1075 issued a decree dealing with the position of Henry IV. and with the question of lay appointments to bishoprics in general. In the decree of the Council held at Rome in November 1078, the condemnation of lay "investitures" is clearly expressed. In this decree it is said that, inasmuch as in many cases the "investitures" of churches have

been made by lay persons, contrary to the statutes of the Fathers, it is ordained that no ecclesiastic is to receive the “ investiture ” of a bishopric, abbey, or church from the hand of the emperor or king, or any lay person, man or woman, and that if he should do this the “ investiture ” would be void, and the person receiving it would be excommunicated.¹ It is also laid down that all appointments which were simoniacal, or were made without the consent of the clergy and people, and the approval of those to whom the right of consecration belonged, were to be reckoned as void.² The Roman Council of March 1080 repeated this prohibition, and added some very important provisions. If any person for the future should receive a bishopric or abbey from the hand of any lay person, he was not to be reckoned among the bishops or abbots, and any person either receiving or giving “ investiture ” was to be excommunicated.³ When there was a vacancy in any church the Apostolic See or the metropolitan was to send a bishop, under whose direction the clergy and people, without fear or favour of any secular interference, were to elect a pastor, with the consent of the Apostolic See or the metropolitan. If they should act otherwise, the election would be void, and they would lose the power of election, which would pass to the Apostolic See or the metropolitan.⁴

With these decrees of the Council of Rome of 1080 the position of Gregory VII. with regard to the relations of the secular authority to the appointment of bishops and abbots was fully developed. This does not mean, however, that we can be quite certain in our interpretation of his position. He does dogmatically and clearly prohibit all lay “investiture,” but whether this means that he intended to forbid the secular authorities to have any place in ecclesiastical appointments is not quite clear. As we have already seen, the word “ investiture ” had a technical sense, but it was not always used technically, and we cannot be confident as to the precise meaning of the phrase in these statements and decrees of Gregory which we have cited. It was only in the course of the controversy which followed that these ambiguities were gradually cleared up.

CHAPTER III.

THE DISCUSSION OF THE “ INVESTITURE ” QUESTION—I.

WE have endeavoured to trace some of the circumstances which led up to the prohibition of lay “ investiture ” in the year 1075. We have now to consider the history of the controversy which this raised, and to inquire into the precise nature of the matter in dispute, as it presented itself to the minds of the disputants. As we shall see, the controversy frequently tended to turn on the question of the use of the pastoral staff and the episcopal ring in “ investiture,” but it is clear that this was not the real subject in dispute. The matters which were really important were, on the papal side, the principle that ecclesiastical appointments should not be absolutely controlled by the secular power ; on the imperialist, the principle that the secular power was entitled to some voice in such appointments.

We have a temperate statement of the imperialist position in the treatise or letter composed in the name of Theodoric, the Bishop of Verdun, by Wenrich of Trier, in the years 1081-82.¹ He admits that there is some appearance of reason in the contention that bishops should not be appointed by the prince. He complains, however, that the prohibition of this had been put out with undue violence and haste, and that the real motive for it was not zeal for religion, but hatred of the prince (i.e., Henry IV.). Appointments made by Rudolph of Suabia and by other kings were sanctioned,

or at least treated with consideration, while bishops who were faithful to Henry IV., even though properly elected and received by the common consent, were condemned and excommunicated. And, further, he contends that this custom, that is of appointment by the prince, had at least existed and been approved for many ages, and he cites the accounts of the appointments of priests by the Kings of Israel, the precedents of the Maccabean period, and various passages from the writings of Gregory the Great and Isidore of Seville.¹

The imperialist position is drawn out much more completely in a work, written probably in the year 1086, by Wido, Bishop of Ferrara.² He gives a brief account of the arguments against the imperial “investitures” of bishops, and specially mentions some passages from the writings of St Ambrose which might be cited in support of these contentions, but sets them aside as not really relevant to the matter in dispute. He urges that it is necessary to distinguish clearly between two aspects of the position of the bishop. On the one hand his office is spiritual, and all his spiritual powers are given to him by the Holy Spirit, through the ministry of other bishops. On the other hand he has secular authority and possessions, and these are given to him by the prince. The spiritual powers given to him by the Holy Spirit are not subject to the imperial power, but the tenure of the secular things, as they are granted by the secular power, must be renewed by the successive holders of that authority. It is here that he finds the explanation and justification of the fact that, as he maintains, the power of “investiture” was granted to the emperors by Pope Hadrian I. and Pope Leo III. He adds that this was also done in order to prevent the popular disturbances which were often incidental to episcopal elections.¹

Wido finds a further confirmation of his view of the legitimate place of the prince in episcopal elections in the provisions of the decree of Pope Nicholas II., as he understands it, that no one should become Bishop of Rome without the imperial consent. He attributes this in large measure to the recognition of the disorders attendant upon episcopal elections when they were uncontrolled by the secular power, and especially to the conflict of the three occupants of the Papal See before the intervention of Henry III., as well as to the recognition that all the secular authority of the bishop was derived from kings and emperors, and could not be held except under their grant; and he urges that it was only by this authority that the clergy could claim exemption from any form of taxation.¹ He then quotes from the correspondence of Braulio with Isidore of Seville, some passages to show that Isidore recognised the authority of the king in the creation of bishops. Finally, he urges that those who contended that the appointment of bishops belonged only to the clergy should remember that it was Moses, although he was not a priest, through whom God gave the law and ordered the priesthood, and that if this had been permitted to one who held no sacred office it need not be thought improper that emperors and kings should appoint to bishoprics, for they received an unction greater and more honourable in some respects than the priest, and they were not to be reckoned as mere laymen.¹

If we endeavour to consider these arguments and to measure their significance, it would seem that the really important consideration which Wido urged was that the temporalities of the bishop can only be recognised as his, subject to the secular authority, and that it is the prince who must grant them. He was also aware that there was a considerable body of precedents for the secular claim to authority in the appointment of

bishops, even apart from the evidence of the spurious documents of Hadrian I. and Leo III., which as it seems he was the first to use, and he urged that the imperial authority had been very serviceable in restoring order to the Church.

What importance may belong to his last argument, that the emperor or king was, in virtue of his anointing, no mere layman, we shall have occasion to consider again. The most important contention is the first, for it already foreshadows the nature of the settlement which was arrived at in 1122 at Worms.

We must now compare with the position of Wenrich and Wido, the views and arguments of some of the earlier defenders of the action of Gregory VII. in prohibiting lay "investiture." The first of these is Manegold of Lautenbach, whose treatise, 'Ad Gebehardum,' was written probably in 1085.

He quotes the prohibition in the form of the decree of the Roman Council of 1078, and maintains with characteristic vehemence that it represents the Catholic tradition, the decisions of Councils, and the judgment of the Fathers. He urges especially a regulation of the so-called Apostolical Canons, the often-quoted affirmation of Pope Leo I. that no one could be held to be a bishop who had not been elected by the clergy, demanded by the people, and consecrated by the bishops of the province with the approval of the metropolitan, and the equally well-known saying of Pope Celestine I. (which he attributes to Innocent I.), that no bishop might be imposed upon an unwilling people ; and he argues that if this is true it is obvious that bishops cannot be appointed by kings and princes at their arbitrary will.¹

A little later lie denounces in terms similar to those of Cardinal Humbert, to which we have already referred, the ignoble arts by which many curried favour with the secular authorities, and endeavoured to obtain ecclesiastical offices.¹

Manegold then, with evident reference to the arguments of Wenrich, discusses the alleged precedents of the Maccabean period, and contends that these had been misunderstood, but that, even if this were not so, they would have no authority, for the Books of Maccabees do not properly belong to the Canon of Scripture.¹ In the same way he argues that the alleged appointment of Sadoc as High Priest by Solomon was a mistake; but that, even if correct, it would not prove anything, for even if such an authority had been given to kings under the circumstances of those times, it would not justify this under the new dispensation.²

The contention of Wenrich that St Isidore and St Gregory the Great recognised the rightful authority of kings and emperors in the appointment of bishops he considers at considerable length, and argues that the passages from their writings which Wenrich had cited had been misunderstood, and then brings forward a great many citations to show that the elections to the Roman See had not been subject to any secular authority, while, on the other hand, the Pope had authority in the appointment of bishops, and in the constitution of new dioceses.³

Having thus dealt with the arguments which had been used in defence of the appointment of bishops by the secular authority, he urges the absurdity as well as the impropriety of the investiture of bishops by the king with the ring and staff, for these were the symbols of spiritual mysteries and, as Manegold says, it was customary that they should be given again by the consecrating bishops after they had been received from the king ; this was a manifest absurdity.⁴

Manegold urges with vehemence his contention against the claim of the secular authority to appoint bishops, as well as against the “ investiture ” with ring and staff by laymen, but it is not clear that he intended to maintain that the secular authority should have no voice in the appointment. It is the arbitrary action of the prince which he rejects : it does not seem as though his mind would necessarily have been closed to some compromise.

In 1087, the year after Wido of Ferrara had written the treatise which we have considered, Cardinal Deusdedit produced his ‘ *Collectio Canonum*,’ in which he set out a number of authoritative passages which required the freedom of episcopal election, and condemned the appointment of bishops by the secular power.¹ In 1097 Deusdedit set about the composition of a work, ‘ *Libellus contra invasores et symoniacos*,’ in which he argues the question in detail. He begins by setting out the purpose of his work, and describes it as a reply to those simoniacal and schismatic persons who say that the Church of Christ is subject to the royal power, and that the king can appoint the ministers of religion at his discretion, and has the right to transfer the property of the Church to himself or to others as he pleases. He protests, however, that in saying this he must not be thought to be derogating from the royal honour, for the office of the priest is one and that of the king another. Each has need of the other, and neither should intrude upon the functions of the other.²

He commences, therefore, by citing the sentence from the so- called Apostolical Canons: “*Siquis episcopus sseclariibus potes- tatibus usus ecclesiam per ipsis obtineat, deponatur; et segre- gentur omnes qui illi communicant.*” He thinks that this was promulgated by the Apostles foreseeing that the time would come when the Temporal power would be converted to Christianity, and would be tempted to impose its authority upon the Church, and to appoint its ministers by its own authority and at its pleasure. He is aware that the authenticity of these Canons had been questioned, but maintains that they had been recognised by various Councils and Fathers ; and he urges that for a long time the Church kept this tradition inviolate, and the clergy and people of each church elected their own bishop.¹ This custom continued until the churches grew numerous and wealthy, and was recognised as binding by Popes and emperors. The first emperors who violated this tradition were some of those whom he calls Eutychian, like Zeno and Anastasius, and their example was followed by some of the later Greek emperors. Deusdedit is aware that at one time even the Roman Church notified the election of its bishop to the emperor before proceeding to his consecration. He then enumerates a number of papal and conciliar decrees which required the freedom of election and forbade the interference of the secular authorities.¹ He finds some difficulty in dealing with the decree about papal elections issued by Pope Nicholas II., and its provision that the emperors were to be notified after his election, but before his consecration. He urges first that this provision of the decree, if indeed it had been thus expressed, had been invalidated by the conduct of the king and his advisers in attempting to depose Nicholas II., and later in setting up first Cadalous of Parma, and then Guibert of Ravenna, as anti-popes. Secondly, he maintains that the copies of the decree had been so much tampered with that they were not consistent with each other. Thirdly, he contends that, if Nicholas did indeed issue such a regulation, it was invalid ; for he, being only one patriarch, could not, even with the Council of his bishops, change that which had been ordained by five patriarchs and

more than a thousand Fathers, and confirmed by the Christian emperors, for in their decrees no power of interference in the election or appointment of bishops was conceded to the royal authority.²

He then cites a number of passages from the writings of the Popes and from the Roman law to prove that any action which has been taken illegally and wrongly must be annulled, and concludes that the decree of Pope Nicholas was null and void. He contends that, in maintaining this, he was not saying anything disrespectful to the memory of Pope Nicholas, for, inasmuch as he was human, it was always possible that he might have been persuaded to do something which was contrary to that which was lawful and right; and he cites the case of Pope Boniface II. as having annulled a decree which he had wrongly made, and urges that Nicholas II. would have done the same had he seen the opinions of the Fathers collected and knew that they were contrary to his decree.¹

Deusdedit then deals with the contention that the appointment of bishops by the secular authority at its pleasure was sanctioned by long custom, and argues that, in the case of divergent customs, that must be followed which could be traced back to apostolic times, and that the perversion of this by secular princes could not prejudice its authority.¹ Finally, he urges that it was the appointment to ecclesiastical office by the prince which was the cause of the prevalence of simony and of the neglect of their duties by ecclesiastics, while they crowded to the court to obtain preferment by what were often unworthy services, and he develops this into an attack upon the royal chapels and their clergy.⁸

For these reasons then, Deusdedit contends, Gregory VII. had declared all secular appointments to bishoprics and abbeys null and void, and that all secular persons who ventured to give the “ investiture ” of these should be excommunicated, and he quotes the decree of the Council of Rome of 1080.¹

It is noteworthy that Deusdedit applies the same principle to the question of the private patronage of parish churches, and maintains that the parish priest should be appointed by the clergy and people of the parish, and that no one should be appointed against their will.²

If we now endeavour to sum up the main points in the controversial literature, so far as we have examined it, we may say that while much had been urged by the representatives of the imperial party which might be interpreted as a defence of that large power of the secular authority in determining the appointment of bishops, which they had undoubtedly exercised for a considerable time, the protagonists of the imperial party had already recognised that there was an essential distinction between the spiritual and the temporal aspects of the episcopal position, and had admitted that the secular claim to determine ecclesiastical appointments was related purely to the temporal. On the other hand, the supporters of Gregory VII. had indeed sometimes seemed determined to refuse to admit that the temporal power could have any place in ecclesiastical appointments, but their emphasis had been laid on the denial of any arbitrary authority to appoint at their pleasure, and in the assertion of the rights of the clergy and people of the diocese to a free election ; while they also laid great stress upon the practical evils which had arisen from the abuse of the secular authority. So far they had not discussed and met the contention of the imperial party, which laid stress upon the secular position of the great ecclesiastical officers.

With the end of the eleventh century the controversy began to assume a somewhat different form, and we must now consider this.